DOCKET

No. 88-1213-CSX
Status: GRANTED

Docketed:
January 17, 1989

Title: Employment Division, Department of Human Resources of Oregon, et al., Petitioners
v.
Alfred L. Smith, et al.

Court: Supreme Court of Oregon

Counsel for petitioner: Linder,Virginia L.

Counsel for respondent: Dorsay,Craig J.

Entry	Date	Note	Proceedings and Orders
1	Jan 17 1989	G	Petition for writ of certiorari filed.
2	Feb 17 1989		Brief of respondents Alfred L. Smith, Galen W. Black, and ADAPT in opposition filed.
3	Feb 22 1989		DISTRIBUTED. March 17, 1989
4	Mar 20 1989		Petition GRANTED.
			**
5	Apr 21 1989	G	Motion of petitioners to dispense with printing the joint appendix filed.
6	May 1 1989		Motion of petitioners to dispense with printing the joint appendix GRANTED.
8	May 1 1989		Order extending time to file brief of petitioner on the merits until May 18, 1989.
10	May 22 1989		Brief of petitioner Employment Div., Dept. of Human Resources filed.
12	May 30 1989		Order extending time to file brief of respondent on the merits until July 15, 1989.
13	Jun 21 1989		Brief amicus curiae of American Jewish Congress filed.
14	Jul 14 1989		Brief of respondents Alfred L. Smith, et al. filed.
15	Jul 14 1989		Brief amici curiae of ACLU, et al. filed.
16	Jul 14 1989		Brief amicus curiae of Council on Religious Freedom filed.
17	Jul 14 1989		Brief amici curiae of Association on American Indian Affairs, et al. filed.
18	Jul 27 1989		CIRCULATED.
19	Aug 2 1989	D	Application (A89-91) to file a reply brief in excess of page limits, submitted to Justice O'Connor.
20	Aug 4 1989		Application (A89-91) denied by Justice O'Connor.
21	Aug 8 1989	G	Application (A89-110) for extension of time within which to file reply brief on the merits, submitted to Justice O'Connor.
22	Aug 9 1989		Application (A89-110) granted by Justice O'Connor extending the time to file until August 21, 1989.
23	Aug 21 1989	X	Reply brief of petitioner Employment Division, Dept of Human Resources filed.
24	Aug 28 1989		SET FOR ARGUMENT MONDAY, NOVEMBER 6, 1989. (2ND CASE)
25	Oct 17 1989	X	Supplemental brief of respondents Alfred L. Smith, et al. filed.
26	Nov 6 1989		ARGUED.

PETITION FOR WRIT OF CERTIORARI

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88-1213

No. ______

Supreme Court, U.S.
FILED
JAN 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

EMPLOYMENT DIVISION,
DEPARTMENT OF HUMAN RESOURCES,
of the STATE OF OREGON,
W.E. HUNTER, Administrator,

Petitioners,

v.

ALFRED L. SMITH
GALEN W. BLACK,
and ADAPT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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48 pp

QUESTION PRESENTED

Does the Free Exercise Clause of the first amendment to the United States Constitution protect a person's religiously motivated use of peyote from the reach of a state's general criminal law prohibition?

TABLE OF CONTENTS

Page

Question Presented i

Petition for Writ of Certiorari 1

Opinions Below 1

Jurisdiction 1

Constitutional Provisions Statutes and Regulations Involved 1

Statement of the Case 2

Reasons to Allow the Writ 5

I. The Oregon Supreme Court's Decision Answers the State Law Questions in a Way that Squarely Presents the Federal Issue for Resolution 5

II. This Court should Review the Oregon Court's Weakly Analyzed Conclusion that the First Amendment Protects Religious Peyote Ingestion ... 8

Conclusion 13

Appendix A App-1

Appendix B App-11

TABLE OF AUTHORITIES

Page

Cases Cited

Employment Div., Department of Human Res. v. Smith, ___ U.S. ___, 108 S.Ct. 1444 (1988) .... passim

Jacobson v. Massachusetts, 197 U.S. 11 (1905) 12

Kennedy v. Bureau of Narcotics and Dangerous Drugs, 459 F.2d 415 (9th Cir. 1972) *cert. denied*, 409 U.S. 1115 (1973) 10

Native American Church of New York v. United States, 468 F.Supp. 1247 (S.D. N.Y. 1979) *aff'd* 633 F.2d 205 (2d Cir. 1980) 10

Olsen v. Drug Enforcement Administration, D.C. Cir. No. 86-1442 11-12

Olsen v. Lawn, D.C. Cir. No. 86-0236 12

People v. Woody, 61 Cal.2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964) 8,9

Peyote Way Church of God, Inc. v. Meese III, 698 F.Supp 1342 (N.D. Tex. 1988) 10

Prince v. Massachusetts, 321 U.S. 158 (1944) 12

Reynolds v. United States, 98 U.S. 145 (1878) 12

Sherbert v. Verner, 374 U.S. 398 (1963) 3,5

Smith v. Employment Div., 301 Or. 209, 721 P.2d 455 (1986) 3

Smith v. Employment Division, 307 Or. 68, 763 P.2d 146 (1988) .... passim

Sterling v. Cupp, 290 Or. 611, 625 P.2d 123 (1981) 8

Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981) 3

United States v. Rush, 738 F.2d 497 (1st Cir. 1984) *cert. denied*, 470 U.S. 1004 (1985) 9

Wisconsin v. Yoder, 406 U.S. 205 (1972) 12

Constitutional Provisions

U.S. Constitution, Amendment I 1

Page

Statutory Provisions

21 U.S.C. § 812(b)(1)(A) 11
28 U.S.C. § 2101(c) (1982) 1
42 U.S.C. § 1996 (1982) 9
28 U.S.C.S. § 1257(3) (1988) 1
Or. Rev. Stat. § 475.992(4)(a) (1985) 2,11

Administrative Regulations

21 C.F.R. § 1308.11(d) (1988) 11
Or. Admin. R. 855-80-020 (1987) 2
Or. Admin. R. 855-80-021 (1987) 2,11
Or. Admin. R. 855-80-022 (1987) 11

Other Authorities

United States Supreme Court Rule 20.4 1

PETITION FOR WRIT OF CERTIORARI

Petitioners, the Employment Division, Department of Human Resources of the State of Oregon, and W.E. Hunter, Administrator, (hereafter "the state"), respectfully pray that this Court again issue a writ of certiorari to review the Oregon Supreme Court's judgment and opinion on remand from this Court in these consolidated cases.

OPINIONS BELOW

The Oregon Supreme Court's opinion is reported as *Smith v. Employment Division*, 307 Or. 68, 763 P.2d 146 (1988) (*per curiam*) and is attached to this petition as Appendix A. This Court's opinion remanding the cases to the Oregon Supreme Court for further proceedings is reported as *Employment Div., Dept. of Human Res. v. Smith*, ___ U.S. ___, 108 S.Ct. 1444 (1988) and is attached to this petition as Appendix B.

JURISDICTION

This Court remanded these cases to the Oregon Supreme Court by judgment and opinion entered on April 27, 1988. The Oregon Supreme Court heard additional arguments in the cases on September 6, 1988. The Oregon Supreme Court's judgment and opinion on remand was dated and filed on October 18, 1988. Jurisdiction to review the Oregon Supreme Court's judgment in this civil case by writ of certiorari is conferred upon this Court by 28 U.S.C.S. § 1257(3) (1988). This petition for writ of certiorari is filed within the 90-day period prescribed by 28 U.S.C. § 2101(c) (1982), as computed in accordance with Rule 20.4 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS STATUTES AND REGULATIONS INVOLVED

The first amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

Or. Rev. Stat. § 475.992(4)(a) (1985) provides:

> It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of professional practice, or except as otherwise authorized by ORS 475.005 to 475.285, 475.940 to 475.965 and 475.991 to 476.995. Any person who violates this subsection with respect to:
>
> (a) A controlled substance in Schedule I, is guilty of a Class B felony.

Or. Admin. R. 855-80-020 (1987) provides:

> Pursuant to ORS 475.005(6) as amended by Chapter 666, Oregon Laws 1981, effective August 18, 1981, those drugs and their immediate precursors classified in Schedules I through V under the **Federal Controlled Substances Act, 21 USC Section 811 to 812**, as of August 18, 1981 and as amended by the Board pursuant to ORS 457.035 are the controlled substances for purposes of regulation and control under the Act. Those schedules are set out in rules 855-80-021 through 855-80-026.

Or. Admin. R. 855-80-021 (1987) provides, in relevant part:

> Schedule I consists of the drugs and other substances, by whatever official, usual, chemical, or brand name designated, listed in this rule:
>
> . . . .
>
> (3) *Hallucinogenic substances*. . . .
>
> (s) Peyote—Meaning all parts of the plant presently classified as *Lophophorawilliamsii Lemaire*, whether growing or not, the seeds thereof, any extract from any part of such plant, and every compound, manufacture, salts, derivative, mixture, or preparation of such plant, its seeds and extracts.

STATEMENT OF THE CASE

Respondents Alfred Smith and Galen Black were drug and alcohol counselors employed by a private, nonprofit substance abuse treatment organization. Pursuant to its treatment philosophy, the employer required its counselors to agree to

abstain from alcohol and drugs as a condition of employment. Despite that agreement, respondents used peyote, a Schedule I controlled substance, as part of a Native American religious ceremony. Their employer fired them.

Smith and Black filed claims for unemployment benefits. The Employment Division denied their claims on the ground that the use of peyote was misconduct connected with the work. Both Smith and Black were members of the Native American Church, although only Smith is a Native American. Both claimants asserted that, because their drug use was religiously motivated, the state and federal constitutions require the state to grant them unemployment benefits, notwithstanding their disqualification under the compensation scheme. The Employment Division considered and rejected their constitutional arguments.

On review in the Oregon Supreme Court, the state's highest court rejected Smith and Black's arguments that the Oregon Constitution required the payment of benefits. *Smith v. Employment Div.*, 301 Or. 209, 216, 721 P.2d 455, 448-49 (1986). The court then considered their federal constitutional claim. On the basis of its understanding of this Court's decisions in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981), the Oregon Supreme Court found that the first amendment's Free Exercise Clause requires the payment of benefits. *Id.*, 301 Or. at 217-20, 721 P.2d at 450-51. The Oregon court did not expressly address the fact that peyote use is illegal in Oregon. Nor did it consider whether claimants' ingestion of peyote in a religious ceremony is prohibited in Oregon or whether such a prohibition is consistent with the United States Constitution.

The Employment Division petitioned this Court for a writ of certiorari, asking the Court to decide whether the federal constitution requires a state to pay unemployment benefits to someone whose religiously motivated misconduct is criminal under state law. This Court granted the petition. In its majority opinion, the Court agreed with the state that the lawfulness of the disqualifying conduct is all-important in determining whether the first amendment compels the award of benefits. *Employment Div., Dept. of Human Res. v. Smith*, ___ U.S. ___, 108 S.Ct. 1444, 1450-51 (1988). The Court held that if a state, consistent with the Free Exercise Clause, has prohibited certain religiously motivated conduct through its criminal laws, then it is free to deny unemployment benefits to persons who would otherwise be disqualified because of such conduct. 108 S.Ct. at 1450. However, the Court concluded that there were unresolved, potentially dispositive state law questions concerning whether religious peyote use is in fact unlawful in Oregon. As a result, the Court declined to reach Smith and Black's argument that Oregon's criminal prohibition is itself unconstitutional under the Free Exercise Clause. The Court accordingly vacated the Oregon Supreme Court's judgments and remanded the cases for resolution of the state law questions that had surfaced. 108 S.Ct. at 1451-52.

On remand, the parties submitted supplemental briefs addressing: (1) whether the Oregon statutory prohibition extends to religious peyote ingestion; (2) assuming arguendo the Oregon court's earlier opinion in Smith's case did not settle the question, whether the Oregon Constitution protects Smith and Black's conduct; and (3) whether the federal constitution exempts religious peyote use from the reach of a state's criminal laws. The Oregon Supreme Court concluded that the conduct is criminal under Oregon law. *Smith v. Employment Div.*, 307 Or. at 72-73, 763 P.2d at 148. The court therefore reached the federal question, and held that Oregon's blanket peyote prohibition violates the protection that the first amendment extends to good faith religious peyote use by Native American Church members. *Id.*, 307 Or. at 73-76, 763 P.2d at 148-50.

REASONS TO ALLOW THE WRIT

In vacating the Oregon Supreme Court's earlier judgments, this Court observed that it may ultimately be necessary to decide whether religious peyote ingestion "is a form of conduct protected by the federal constitution from the reach of a State's criminal laws." 108 S.Ct. at 1451. But the Court deemed it appropriate first to return these cases to the state court for "further guidance concerning the status of the practice as a matter of Oregon law." *Ibid.* The Oregon Supreme Court resolved the state law questions, concluding that religious peyote ingestion is criminal and unprotected under Oregon law. The state court therefore decided the federal question that this Court left unresolved. It held that the United States Constitution requires government to grant selective exemptions from the application of its criminal laws based upon the religious motivations of the person who engages in the criminal conduct. This Court, however, has never recognized the existence of a constitutional exemption from health and safety criminal prohibitions. The Oregon court's conclusion is wrong, its analysis is shallow, and the ramifications of its holding are far-reaching. Because the state court's decision on remand disposes of an important federal question with scant attention to the principles that have guided this court in resolving similar issues, the question merits this Court's further review.

I. The Oregon Supreme Court's Decision Answers the State Law Questions in a Way that Squarely Presents the Federal Issue for Resolution.

When these cases were before this Court previously, the question presented was whether the first amendment compels payment of unemployment benefits to an employee whose religiously motivated misconduct is criminal under state law. The state argued that this Court's prior decisions (*Sherbert v. Verner*, 374 U.S. 398, and its progeny) were not controlling because, here, the employees' disqualifying conduct was criminal; it could not lawfully be engaged in, even for religious reasons. Therefore, we argued, Smith and Black had no protected interest to assert. (Pet. Br. at 11-12.)

Not surprisingly, Smith and Black responded by challenging the constitutionality of Oregon's criminal prohibition under the federal Free Exercise Clause. They also raised the new and, as the state viewed it, strained argument that religious peyote ingestion is not prohibited at all by Oregon's statutes. Specifically, they asserted that Oregon's statutes proscribe only possession, not use, of controlled substances and that ingestion of peyote at a religious ceremony is not "possession" within the meaning of Oregon law. Significantly, Smith and Black did not argue that the Oregon Constitution protects their conduct.

A majority of this Court agreed that "if Oregon does prohibit the religious use of peyote, and if that prohibition is consistent with the Federal Constitution, there is no federal right to engage in that conduct in Oregon. If that is the case, the State is free to withhold unemployment compensation from respondents for engaging in work-related misconduct, despite its religious motivation." 108 S.Ct. at 1451. But the state law-based argument that religious drug ingestion is not criminal conduct caused the Court to deem it premature to resolve the remaining federal issue: Whether the federal constitution protects religious peyote use from the state law's reach. Because this Court found the Oregon Supreme Court's earlier opinion ambiguous on the legality of the practice under state law, the Court remanded the cases to the Oregon Supreme Court. 108 S.Ct. at 1452.

The Oregon court correctly understood that the cases were returned "for clarification of the legality of petitioners' use of peyote" because this Court "was uncertain whether Oregon law proscribed the peyote use in question here and, if so, whether the law could constitutionally be applied to petitioners." 307 Or. at 72, 763 P.2d at 147. In supplemental

briefing on remand, Smith and Black pressed their argument that religious peyote ingestion is not "possession" within the meaning of Oregon's law. They also raised a state constitutional challenge to the statute.

The Oregon Supreme Court summarily disposed of the statutory argument, stating simply "[w]e conclude that the Oregon statute against possession of controlled substances, which include peyote, makes no exception for the sacramental use of peyote." 307 Or. at 72-73, 763 P.2d at 148. *See also* n. 2 ("Neither the statute nor the regulation make an exception for religious use of peyote, nor do they by reference adopt the exemption found in federal law."). The state court declined even to address the Oregon constitutional claim, possibly agreeing with the state on remand that the court's prior opinion in Smith's case effectively disposed of that question. And, finally, the court noted by way of footnote that anything other than a facial challenge to the criminal prohibition was not properly before it in these cases.[1]

The Oregon Supreme Court's unwillingness to discuss claimants' state law arguments in any depth is disappointing. Nevertheless, the court unequivocally concluded that religious peyote ingestion is criminal under Oregon law and not protected. The court therefore reached and resolved the federal issue, in accordance with its unrelenting practice of deciding federal constitutional challenges only if all independent state law grounds are not dispositive. *See, e.g., Sterling v. Cupp*, 290 Or. 611, 614, 625 P.2d 123, 126 (1981). *See also Employment Div., Dept. of Human Res. v. Smith*, 108 S.Ct. at 1447 and n. 9 (recognizing Oregon Supreme Court's consistent practice of deciding all state law questions before considering federal claims). Indeed, the Oregon court devoted the bulk of its opinion to the first amendment question. It accordingly cleared the path for consideration of the federal question that this Court recognized "may ultimately be necessary to answer" in these cases. The question is now ripe for this Court's final resolution.

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[1] In footnote 3 to its opinion, the Oregon court reserved judgment as to whether the particular circumstances involved in a specific prosecution might give rise to constitutional protection. For purposes of considering any claim other than a facial challenge to the statute, the Oregon court observed that its opinion would be purely advisory:

> If disqualification from unemployment compensation hinged on guilt or innocence of an uncharged and untried crime, it would raise issues of the applicable mental state and of changing burdens of proof for which the compensation procedure is neither designed nor equipped. Because no criminal case is before us, we do not give an advisory opinion on the circumstances under which prosecuting members of the Native American Church under ORS 475.992(4)(a) for sacramental use of peyote would violate the Oregon Constitution.

307 Or. at 73, 763 P.2d at 148. This approach was consistent with this Court's caution, in footnote 17, that the Court's concern was "not with whether some fact unique to respondents' cases bars their prosecution, but with whether Oregon law provides a general exemption from the scope of its criminal laws for the religious use of peyote."

II. This Court should Review the Oregon Court's Weakly Analyzed Conclusion that the First Amendment Protects Religious Peyote Ingestion.

The Oregon Supreme Court's decision resolved the sensitive and significant Free Exercise Clause question presented without any reference to relevant principles and precendents.[2] The state court simply rested its conclusion on the observation that Congress (or at least some of its members) believed Native American religious use of peyote is protected by the first amendment. To support its assessment of Congress' understanding, the state court pointed to one representative's statements made when the House adopted legislation regulating drug use generally, including peyote. Citing a 1964 California Supreme Court decision,[3] that same congressional member assured the House that the Food and Drug Administration would not be able to forbid Native American religious peyote ingestion. The state court also referred to a legislative committee report that accompanied the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1982), in which the committee viewed it as "established federal law" that Native American religious peyote ingestion is constitutionally protected. 307 Or. at 74-75, 763 P.2d at 149.

The Oregon Supreme Court's holding is not a product of the court's independent assessment of what the first amendment requires. At most, it represents a choice to defer to congressional assumptions about the requirements of the federal constitution. Those assumptions are based in turn on a state court decision, and perhaps on one or more lower federal court decisions. The state court has thus substituted a survey of "conventional wisdom" for constitutional analysis. This process of canvassing congressional understanding to resolve an important first amendment question would be troubling under any circumstance. But where, as here, the issue had merited this Court's attention and had been fully briefed and argued at a national level, the Oregon court's superficial approach is inexplicable.

The first amendment question is significant; it merits careful and considered resolution. Lower state and federal courts have struggled in analyzing claims to constitutional protection for religiously motivated drug use. There is no common denominator to the reported decisions, except that, in general, religious drug use is protected for one group of believers (the Native American Church) and protection is denied to all others. *Compare, e.g., People v. Woody*, 61 Cal.2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964) (good faith Native American Church peyote use constitutionally protected) *with United States v. Rush*, 738 F.2d 497, 511-13 (1st Cir. 1984) *cert. denied*, 470 U.S. 1004 (1985) (good faith religious marijuana use by Ethiopian church members not constitutionally protected). But even as to Native American peyote use, the decisions are not unanimous. The Oregon Supreme Court's holding directly contradicts a decision of the Ninth Circuit Court of Appeals, which concluded that the federal exemption for religious peyote use violates the constitution by carving out a denomination-based preference unrelated to government's interests in regulating dangerous drugs. *Kennedy v. Bureau of Narcotics and Dangerous Drugs*, 459 F.2d 415 (9th Cir. 1972) *cert. denied*, 409 U.S. 1115 (1973). And, finally, lower courts are at odds on whether the religious peyote use exemption extends only to the Native American Church or whether constitutionally it must extend also to sincere peyotists who belong to other churches with beliefs essentially identical to the Native American Church. *Compare, e.g., Native American Church of New York v. United States*, 468 F.Supp. 1247 (S.D. N.Y. 1979) *aff'd* 633 F.2d 205 (2d Cir. 1980) (constitution protects sincere sacramental peyote use by non-Native American Church members) *with Peyote Way Church of God, Inc. v. Meese III*, 698 F.Supp. 1342 (N.D. Tex. 1988) (despite the sincerity of their beliefs, members of a church formed by individuals who left the Native American Church are not entitled to constitutional protection for their sacramental peyote use.)

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[2] After this Court's remand to the Oregon Supreme Court, the parties agreed that the state court should have the benefit of the parties' extensive briefing to this Court on whether the federal constitution prevents state prohibition of religious peyote use. Accordingly, copies of the parties' briefs, as well as those of the *amici*, were submitted to the state court for its consideration.

[3] *People v. Woody*, 61 Cal.2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964).

The confusion and conflict in this area of the law cries out for principled resolution. Few regulatory areas invoke government's interests in public health and safety with force equal to that of drug use. Few drugs trigger that interest with strength equal to that of hallucinogens, such as peyote. Our prior briefs to this Court have fully examined the nature of peyote as well as its effects on the user and on those who may come into contact with the user. But the legitimacy of government's regulatory concern deserves reemphasis. All states and the federal government have determined peyote to be highly dangerous to personal health, and all jurisdictions regulate it intensely. Oregon, like the federal government and most if not all state governments, has placed peyote on its

most stringent regulatory schedule (Schedule I). Thus Oregon, like other states and the federal government, has concluded that peyote cannot be used safely by anyone for any purpose.[4] It ranks in the same class as mescaline, heroin, and LSD (Schedule I substances) and is deemed more dangerous than drugs such as morphine, cocaine and methamphetamine (Schedule II substances). *See* Or. Admin. R. 855-80-021 (1987) (Schedule I) and 855-80-022 (1987) (Schedule II).

The Oregon Supreme Court's decision is bereft of any reference to the state's regulatory interest. Indeed, it is barren of any analysis whatsoever. The state's earlier briefing before this Court cautioned that a principled constitutional line cannot be drawn between peyote and other religiously used drugs (of which there are several) or between the Native American Church and other religions that subscribe to sacramental drug use (of which there are many). (*See generally*, Pet. Br., Case No. 86-946 and 86-947). Our fear that religious drug use exemptions threaten to make state and federal laws patchwork quilts of only partially enforceable prohibitions is neither fanciful nor theoretical. Prior to this case, many other religions and individuals had sought drug law exemptions based on their spiritual practices. *See id.*, Pet. Br. at 18-19 (canvassing reported decisions). The efforts of those individuals and churches continue, fueled perhaps by renewed optimism generated by this Court's attention to the question and the Oregon Supreme Court's decision on remand. Indeed, the federal government currently is in litigation against the Ethiopian Zion Coptic Church, which seeks an exemption for marijuana use like that granted by federal regulations for Native American Church peyote use. *Olsen v. Drug Enforce-*

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[4] Oregon incorporates the federal scheme for scheduling controlled substances. Or. Rev. Stat. § 475.992(4)(a) (1985). Under the federal act, a Schedule I substance is one that has been determined to have a high potential for abuse, no currently accepted medical use in the United States, and a lack of accepted safety for use of the drug, even under medical supervision. 21 U.S.C. § 812(b)(1)(A) (1982). Peyote is included inthe federal Schedule I. 21 C.F.R. § 1308.11(d) (1988).

ment Administration, D.C. Cir. No. 86-1442; *Olsen v. Lawn*, D.C. Cir. No. 86-0236 (consolidated; oral argument scheduled Feb. 7, 1989). In contrast to the Oregon Supreme Court's analysis on remand, the federal government has taken the position that the regulatory exemption for peyote was merely a product of the agency's perception of congressional will; that in fact the agency lacks authority to create such exemptions; and that, in any event, congressional members were wrong: The Free Exercise Clause does not require government to exempt religious peyote or other drug use from valid and neutral criminal laws of general applicability. (*See generally, id.*, Respondent-Appellee's Br.).[5]

A denial of certiorari in this case, despite its non-precedential value, undoubtedly will be viewed by lower courts and perhaps even law enforcement officials as tacit approval of the Oregon Supreme Court's decision on remand. The Free Exercise Clause question presented deserves far more careful consideration than the state court gave it, however. If, in fact, the federal constitution protects religious use of dangerous drugs, that result must be reconciled with decisions of this Court in which health and safety concerns consistently have prevailed over free exercise claims. *E.g., Prince v. Massachusetts*, 321 U.S. 158 (1944) (polygamy); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (small pox vaccinations); *Reynolds v. United States*, 98 U.S. 145 (1878) (disease control). *See also Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972) (distinguishing statutes that are essentially regulatory in nature from those proscribe conduct which threatens public health and safety). If, in fact, prohibitions on dangerous drug use cannot constitutionally be applied to some users in some circumstances, government

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[5] In arguing that the Free Exercise Clause does not compel an exemption for marijuana or any other controlled substance, the federal government's brief focuses on the impossibility of extending an exemption to any one drug or religion without extending exemptions to all religious drug use, recognizing that such a result would severely undermine government's regulatory interests. Respondent-Appellee's Br. at 21-22.

needs to know when it must let the use go unchecked. If, in fact, the result reached by the Oregon Supreme Court is sound federal constitutional law, that pronouncement should come from this Court. We accordingly urge this Court again to grant review in this case and to schedule the case for such supplemental briefing the Court may deem appropriate.

CONCLUSION

For the reasons set forth above, this Court should issue a writ of certiorari in this case to review the decision of the Oregon Supreme Court.

Respectfully submitted,
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APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF OREGON

SMITH,
Respondent on review,
v.
EMPLOYMENT DIVISION,
Petitioner on review,
and
ADAPT,
Respondent.
(84-AB-1217; CA A33421; SC S32481; USSC 86-946)

BLACK,
Respondent on review,
v.
EMPLOYMENT DIVISION,
Petitioner on review,
and
ADAPT,
Respondent.
(84-AB-161; CA A31186; SC S32482; USSC 86-947)
(Cases Consolidated for Argument)
On remand from the Supreme Court of the United States.*

Argued and submitted September 6, 1988.

William F. Gary, Deputy Attorney General, Salem, argued the cause for petitioner on review. On the petitions for review were Dave Frohnmayer, Attorney General, James E. Moun-

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*Judicial review of orders of the Employment Appeals Board, *Smith v. Employment Div.*, 75 Or App 764, 709 P2d 246 (1985), *aff'd as mod* 301 Or 209, 721 P2d 445 (1986). *Black v. Employment Div.*, 75 Or App 735, 707 P2d 1274 (1985), *aff'd as mod* 301 Or 221, 721 P2d 451 (1986). *Vacated and remanded sub nom, Employment Div. v. Smith*, 485 US ___, 108 S Ct 1444, 99 L Ed 2d 753 (1988).

tain, Jr., Solicitor General, and Michael D. Reynolds and Jeff Bennett, Assistant Attorneys General, Salem. On the petitions for reconsideration were Dave Frohnmayer, Attorney General, Virginia L. Linder, Solicitor General, and Michael D. Reynolds, Assistant Attorney General. On petitioner's supplemental briefs were Dave Frohnmayer, Attorney General, William Gary, Deputy Attorney General, and Virginia L. Linder, Solicitor General.

Suanne Lovendahl, Oregon Legal Services Corporation, Roseburg, argued the cause and filed briefs for respondents on review.

David M. Gordon, Thorp, Dennett, Purdy, Golden & Jewett, P.C., Springfield and Allen L. Johnson, Johnson & Kloos, Eugene, filed briefs *amicus curiae* on behalf of American Civil Liberties Union.

Before Peterson, Chief Justice, and Lent, Linde, Campbell, Carson and Jones, Justices.**

PER CURIAM

Remanded to the Employment Appeals Board for entry of orders consistent with this court's decisions of June 24, 1986, *Smith v. Employment Div.*, 301 Or 209, 721 P2d 445 (1986), and *Black v. Employment Div.*, 301 Or 221, 721 P2d 451 (1986).

**Lent, J., retired effective September 30, 1988.

PER CURIAM

These cases are before us on remand from the Supreme Court of the United States. *Employment Div. v. Smith*, 485 US ___, 108 S Ct 1444, 99 L Ed 2d 753 (1988). We had decided that the state could not, consistent with the First Amendment, deny unemployment compensation to petitioners, who had been discharged from employment for ingesting peyote in ceremonies of the Native American Church, of which they were members. *Smith v. Employment Div.*, 301 Or 209, 721 P2d 445 (1986); *Black v. Employment Div.*, 301 Or 221, 721 P2d 451 (1986).

In our earlier opinions, we observed that the record in each case established that peyote use was a sacrament in the Native American Church, that the respondents were members of the church and sincere adherents to this faith, and that their use was in the course of a church ceremony. We also stated that it was immaterial to Oregon's unemployment compensation law whether the use of peyote violated some other law.

> "The Board found that the state's interest in proscribing the use of dangerous drugs was the compelling interest that justified denying the claimant unemployment benefits. However, the legality of ingesting peyote does not affect our analysis of the state's interest. The state's interest in denying unemployment benefits to a claimant discharged for religiously motivated misconduct must be found in the unemployment compensation statutes, not in the criminal statutes proscribing the use of peyote. The Employment Division concedes that 'the commission of an illegal act is not, in and of itself, grounds for disqualification from unemployment benefits. ORS 657.176(3) permits disqualification only if a claimant commits a felony in connection with work * * *. [T]he legality of [claimant's] ingestion of peyote has little direct bearing on this case.'
>
> "The state's interest is simply the financial interest in the payment of benefits from the unemployment

> insurance fund to this claimant and other claimants similarly situated." (Footnote omitted.)

Smith v. Employment Div., *supra*, 301 Or at 218-19. The decisions of the United States Supreme Court on which we relied held that this financial interest did not suffice to override interests of unemployment compensation claimants in the free exercise of their religion. *Thomas v. Review Board*, 450 US 707, 101 S Ct 1425, 67 L Ed 2d 624 (1981); *Sherbert v. Verner*, 374 US 398, 83 S Ct 1790, 10 L Ed 2d 965 (1963).

On certiorari, the United States Supreme Court remanded the decisions to this court for clarification of the legality of petitioners' use of peyote. *Employment Div. v. Smith*, *supra*. Alluding to *Reynolds v. United States*, 98 US 145, 25 L Ed 244 (1878), a decision in which criminal proscription of bigamy was upheld against a Free Exercise challenge, the Court declared:

> "If a bigamist may be sent to jail despite the religious motivation for his misconduct, surely a State may refuse to pay unemployment compensation to a marriage counselor who was discharged because he or she entered into a bigamous relationship. The protection that the First Amendment provides to '*legitimate* claims to the free exercise of religion,' does not extend to conduct that a State has validly proscribed." (Emphasis in original.)

485 US at ____, 108, S Ct at 1451, 99 L Ed 2d at 764. In sum, the Supreme Court held that a state's criminal law is relevant in that if a state has validly criminalized certain types of religiously motivated conduct, it may also deny unemployment benefits to persons discharged for engaging in that conduct. 485 US at ____, 108 S Ct at 1450, 99 L Ed 2d at 763. The Court noted that it was uncertain whether Oregon law proscribed the peyote use in question here and, if so, whether the law could constitutionally be applied to petitioners.[1] We conclude that the Oregon statute against possession of controlled substances, which include peyote,[2] makes no exception for the sacramental use of peyote, but that outright prohibition of good faith religious use of peyote by adult members of the Native American Church would violate the First Amendment directly and as interpreted by Congress. We therefore reaffirm our holding that the First Amendment entitles petitioners to unemployment compensation.[3]

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[1] The Court wrote:

> "The possibility that respondent's conduct would be

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> unprotected if it violated the State's criminal code is, however, sufficient to counsel against affirming the state's holding that the Federal Constitution requires the award of benefits to these respondents. If the Oregon Supreme Court's holding rests on the unstated premise that respondents' conduct is entitled to the same measure of federal constitutional protection regardless of its criminality, that holding is erroneous. If, on the other hand, it rests on the unstated premise that the conduct is not unlawful in Oregon, the explanation of that premise would make it more difficult to distinguish our holdings in Sherbert, Thomas, and Hobbie."

485 US at ____, 108 S Ct at 1452, 99 L Ed 2d at 766.

[2] ORS 475.992(4)(a) prohibits possession of controlled substances listed on a schedule adopted by the State Board of Pharmacy. Peyote is listed on the schedule. OAR 855-80-021(3)(s). Neither the statute nor the regulation make an exception for religious use of peyote, nor do they by reference adopt the exemption found in federal law, *see* 21 CFR § 1307.31 (1987).

At least 11 states expressly exempt sacramental peyote use from criminal proscription. *See* Ariz Rev Stat Ann § 13-3402(B) (West Supp 1987); Colo Rev Stat§ 12-22-317(3) (1985); Iowa Code Ann § 204.204.8 (West 1987); Kan Stat Ann § 65-4116(c)(8) (1985); Minn Stat Ann § 152-02 Subd 2(4) (West Supp 1988); Nev Rev Stat § 453.541 (1987); NM Stat Ann § 30-31-6(D) (Supp 1988); SD Codified Laws Ann § 34-20B-14(17) (1986); Tex Stat Ann 4476-15 § 4.11 (West 1976); Wisc Stat § 161.115 (1975); Wyo Stat 35-7-1044 (1988).

In addition, at least 12 other states link their exemptions to those under federal law. *See* Alaska Stat § 11.71.195 (1983); Miss Code Ann § 41-29-111(d) (1981); Mont Code Ann § 50-32-203 (1987); NJ Stat Ann § 24:21-3(c) (West Supp 1988); NC Gen Stat § 90-88(d) (1985); ND Cent Code § 19-03.1-02.4 (1981); RI Gen Laws § 21-28-2.01(c) (1982); Tenn Code Ann § 39-6-403(d) (1982); Utah Code Ann § 58-37-3(3) (1986); Va Code Ann § 54-524.84:1(d) (1982); Wash Rev Code § 69-50.201(d); W Va Code 60A-2-202(d) (1984).

[3] If disqualification from unemployment compensation hinged on guilt or innocence of an uncharged and untried crime, it would raise issues of the applicable mental state and of changing burdens of proof for which the

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The long history of peyote as the sacred object of the Native American Church, entitling members to a First Amendment exemption from its prohibition, was reviewed by Justice Tobriner 24 years ago in *People v. Woody*, 61 Cal 2d 716, 40 Cal Rptr 69, 394 P2d 813 (1964), quoted extensively in our earlier opinion in *Black v. Employment Div.*, *supra*, 301 Or at 225-227. The court concluded that peyote "plays a central role in the ceremony and practice of the Native American Church" and that its religious use was known in the 16th century. "Although peyote serves as a sacramental symbol similar to bread and wine in certain Christian churches, it is more than a sacrament. Peyote constitutes in itself an object of worship; prayers are devoted to the Holy Ghost. On the other hand, to use peyote for nonreligious purposes is sacrilegious." 61 Cal 2d at 721, 40 Cal Rptr at 73, 394 P2d at 817. To prohibit the use of peyote "results in a virtual inhibition of the practice of defendants' religion." *Id.* at 722. The experience of states that exempted bona fide religious use of peyote from the prohibition did not support any compelling state interest in suppressing it. *Id.* at 722. The court therefore decided that this religious use was privileged under the First Amendment. *See also In re Grady*, 61 Cal 2d 887, 39 Cal Rptr 912, 394 P2d 728 (1964).

Subsequent state and federal decisions have divided on protecting the religious use of peyote under the First Amendment. *See* Brown, *Religion: The Psychedelic Perspective: The Freedom of Religion Defense*, 11 Am Indian L Rev 125 (1983).[4] We do not now reexamine that background

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compensation procedure is neither designed nor equipped. Because no criminal case is before us, we do not give an advisory opinion on the circumstances under which prosecuting members of the Native American Church under ORS 475.992(4)(a) for sacramental use of peyote would violate the Oregon Constitution.

[4] In two recent decisions not related to peyote, the Supreme Court

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recited in *People v. Woody*, *supra*, nor the question on what kind of record such a claim should be examined in the future. The view of the Native American Church and its constitutionally privileged use of peyote that was expressed by the California Supreme Court in *Woody*, was expressly endorsed by Congress.

In 1965, when Congress first brought peyote within the Drug Abuse Control Amendments of 1965, 79 Stat 226 § 3(a), Congress made clear that it expected the implementing regulations to exempt the religious use of peyote. Representative Harris expressly referred to the holding in *Woody* "that prosecutions for the use of peyote in connection with religious ceremonies was a violation of the first amendment to the Constitution," and he gave the House the assurances of the Food and Drug Administration that the bill "cannot forbid bona fide religious use of peyote." 111 Cong Rec 15977 (1965). *See Native American Church of New York v. United States*, 468 F Supp 1247, 1249-50. Congressional approval of exempting the bona fide religious use of peyote in the Native American Church was reiterated in 1970. *See Peyote Way Church of God, Inc. v. Smith*, 742 F2d 193, 197 at n 15 (1984).

Even more emphatically, in 1978, Congress by law made it "the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American

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rejected American Indian religious claims not to be assigned social security numbers, *Bowen v. Roy*, 476 US 693, 106 S Ct 2147, 90 L Ed 2d 735 (1986), and to preserve a religiously important area in a national forest from road-building. *Lyng v. N.W. Indian Cemetery Prot. Asso.*, ___ US ___, 108 S Ct 1492, 99 L Ed [2d] 534 (1988). The Court stressed that these cases involved management of government functions rather than prohibitory regulations. Without addressing whether we would make this distinction between regulatory and managerial functions in a case under Oregon law, *see* Linde, *Constitutional Rights in the Public Sector: Justice Douglas on Liberty in the Welfare State*, 40 Wash L Rev 10 (1965), we note that ORS 475.992(4)(a), of course, is a prohibitory law.

Indian Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." 42 USC 1996 (1982). The accompanying report of the House Committee on Interior and Insular Affairs stated, with respect to federal restrictions of the use of peyote and other substances in Indian religions.

> "To the Indians, these natural objects have religious significance because they are sacred, they have power, they heal, they are necessary to the exercise of rites of the religion, they are necessary to the cultural integrity of the tribe and, therefore, religious survival or a combination of these reasons. To the Federal Government, these substances are restricted because the non-Indian has made them scarce, as in endangered species, or because they pose a health threat to those who misuse them, as in peyote.
>
> "The Federal court system has shown that this apparent conflict can be overcome with the institution of well thought out exceptions. Although acts of Congress prohibit the use of peyote as a hallucinogen, it is established Federal law that peyote is constitutionally protected when used by a bona fide religion as a sacrament."

H. Rep. No. 1308, 95th Cong, 2d Sess 2 (1978). Congress, of course, has the power under section 5 of the Fourteenth Amendment to protect against state infringement what it believes to be the free exercise of religion under the First Amendment. While Congress has not done so expressly, it has unmistakably adopted the view that the use of peyote in the Native American Church is the kind of free exercise of religion that the First Amendment protects. In light of this repeated recognition of that church's use of peyote, we are convinced that the First Amendment would not allow Oregon authorities to seize peyote used in good faith in a religious ceremony of the Native American Church and to prosecute those who possess it.

In our first decision, we concluded that the decisions against denying unemployment compensation to persons whose unemployment results from their exercise of their religious freedom precluded a denial of unemployment compensation in these cases. Because, for the reasons set forth above, we hold on remand that the First Amendment prevents enforcement of prohibitions against possession or use of peyote for religious purposes in the Native American Church, we reaffirm that conclusion.

The case is remanded to the Board for entry of orders consistent with the court's decisions of June 24, 1986, *Smith v. Employment Div.*, 301 Or 209, 721 P2d 445 (1986), and *Black v. Employment Div.*, 301 Or 221, 721 P2d 451 (1986).

APPENDIX B

EMPLOYMENT DIVISION,
DEPARTMENT OF HUMAN RESOURCES OF
the STATE OF OREGON, et al.,
Petitioners,
v.
Alfred L. SMITH.

EMPLOYMENT DIVISION,
DEPARTMENT OF HUMAN RESOURCES OF
the STATE OF OREGON, et al.,
Petitioners,
v.
Galen W. BLACK.
Nos. 86-946, 86-947.
Argued Dec. 8, 1987.
Decided April 27, 1988

William F. Gary, Salem, Or., for petitioners.

Suanne Lovendahl, Roseburg, Or., for respondents.

Justice STEVENS, delivered the opinion of the Court.

Respondents are drug and alcohol abuse rehabilitation counselors who were discharged after they ingested peyote, a hallucinogenic drug, during a religious ceremony of the Native American Church. Both applied for and were denied unemployment compensation by petitioner Employment Division. The Oregon Supreme Court held that this denial, although proper as a matter of Oregon law, violated the Free Exercise Clause of the First Amendment to the Federal Constitution.[1] In reaching that conclusion the state court attached no significance to the fact that the possession of peyote is a felony under Oregon law punishable by imprisonment for up to 10 years.[2] Because we are persuaded that the alleged illegality of respondents' conduct is relevant to the constitutional analysis, we granted certiorari, 480 U.S. ___, 107 S.Ct. 1368, 94 L.Ed.2d 684 (1987), and now vacate the judgments and remand for further proceedings.

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[1] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. Const., Amdt. 1.

I

Respondents Alfred Smith and Galen Black were employed by the Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment (ADAPT), a nonprofit corporation that provides treatment for alcohol and drug abusers. Both were qualified to be counselors, in part, because they had former drug and alcohol dependencies. As a matter of policy, ADAPT required its recovering counselors to abstain from the use of alcohol and nonprescription drugs.[3] ADAPT terminated respondents' employment because they violated that policy. As to each of them the violation consisted of a single act of ingesting a small quantity of peyote for sacramental purposes at a ceremony of the

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[2] Ore. Rev. Stat. §§ 475.992(4)(a), 161.605(2) (1987); see 301 Ore. 209, 219, n. 2, 721 P.2d 445, 450, n. 2 (1986) (quoted at n. 10 *infra*).

[3] This policy reflected ADAPT's treatment philosophy that successful recovery from addiction requires complete abstinence from the use of alcohol and nonprescription drugs. The policy also served to assure that counselors were appropriate role models for their clients. ADAPT's policy statement on drug and alcohol abuse provided, in pertinent part:

> "POLICY STATEMENT ALCOHOL
> AND OTHER DRUG USE BY EMPLOYEES
>
> "In keeping with our drug-free philosophy of treatment, and our belief in the disease concept of alcoholism, and associated complex issues involved in both alcoholism and drug addiction, we require the following of our employees:
>
> "1. Use of an illegal drug or use of prescription drugs in a nonprescribed manner is grounds for immediate termination from employment.
>
> ". . . .
>
> "3. Any use of alcohol by recovering staff will not be allowed, and is grounds for immediate disciplinary action, up to and including termination. Use shall be defined as any ingestion of an alcoholic beverage, in *any* situation." App. 11.

Native American Church. It is undisputed that respondents are members of that church, that their religious beliefs are sincere, and that those beliefs motivated the "misconduct" that led to their discharge.

Both respondents applied for unemployment compensation. Petitioner Employment Division considered the applications in a series of administrative hearings and appeals,[4] at the conclusion of which it determined that the applications should be denied.[5] Petitioner considered and rejected respondents' constitutional claim and concluded that they were ineligible for benefits because they had been discharged for work-related "misconduct."[6]

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[4] Raising identical legal issues and presenting almost identical facts, these two cases proceeded in tandem through state administrative proceedings and through the state courts. They were consolidated upon order of this Court when the State's petitions for certiorari were granted. 480 U.S. ___, 107 S.Ct. 1368, 94 L.Ed.2d 684 (1987).

[5] Each respondent requested a hearing after his application for benefits was denied because he had been discharged for work-related misconduct. After separate hearings, a referee decided that both respondents were entitled to unemployment compensation benefits. In Black's case, the referee held that his ingestion of peyote was "an isolated incident of poor judgment" rather than misconduct. App. 3-5. In Smith's case, the referee concluded that because "there is no evidence in the hearing record to indicate that granting benefits to claimants whose unemployment is caused by adherence to religious beliefs would have any significant impact on the trust fund, it cannot be held that the alleged State interest warrants interference with the claimant's freedom of religion." App. to Pet. for Cert. in No. 86-946, p. A25. On review the Employment Appeals Board disagreed with the referee and concluded that benefits should be denied in both cases. As to Smith, the Board ruled that the State had shown a compelling state interest in denying benefits. That interest was "in the proscription of illegal drugs, not merely in the burden upon the Unemployment Compensation Trust Fund." *Id.*, at A19-A20. In Black's case the Board merely reversed the referee's finding that Black had not been fired for misconduct without reaching the First Amendment issue. App. to Pet. for Cert. in No. 86-947, pp. A23-A24.

[6] Ore. Rev. Stat. § 657.176(2)(a) (1987) provides that "[a]n individual shall be disqualified from the receipt of benefits . . . if . . . the individual . . . [h]as been discharged for misconduct connected with work." Ore. Admin. Rule 471-30-038(3) (1986) provides:

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The Oregon Court of Appeals, considering the constitutional issue en banc, reversed the Board's decisions.[7] The Oregon Supreme Court granted the State's petitions for review in both cases to consider whether the denial of benefits violated the Oregon Constitution[8] or the First Amendment to the Federal Constitution. The cases were argued together, but the court issued separate opinions, fully analyzing the constitutional issues only in *Smith*.

In accordance with its usual practice,[9] the court first addressed the Oregon constitutional issue. The court concluded:

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Under the provisions of ORS 657.176(2)(a) and (b), misconduct is a wilful violation of the standards of behavior which an employer has the right to expect of an employee. An act that amounts to a wilful disregard of an employer's interest, or recurring negligence which demonstrates wrongful intent is misconduct. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct for purposes of denying benefits under ORS 657.176."

[7] In Black's case the majority concluded that the denial of benefits to persons who were discharged for engaging in a religious act constituted a substantial burden on the free exercise rights that was not justified by the State's interest in protecting the Unemployment Compensation Fund from depletion and remanded for further factual findings on the religious nature of respondent's conduct. The dissenting judges expressed the opinion that because the ingestion of peyote was prohibited by Oregon law respondent had no protectable constitutional right on which to base his claim. 75 Ore.App. 735, 707 P.2d 1274 (1985). Smith's case was reversed and remanded for further consideration in light of the decision in *Black*. 75 Ore.App. 764, 709 P.2d 246 (1985).

[8] Art. I of the Oregon Constitution provides, in part:

> "Section 2. Freedom of worship. All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.
>
> "Section 3. Freedom of religious opinion. No law shall in any case whatever control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience."

[9] The Oregon Supreme Court stated in *Sterling v. Cupp*, 290 Ore. 611, 614, 625 P.2d 123, 126 (1981):

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> "Under the Oregon Constitution's freedom of religion provisions, claimant has not shown that his right to worship according to the dictates of his conscience has been infringed upon by the denial of unemployment benefits. We do not imply that a governmental rule or policy disqualifying a person from employment or from public services or benefits by reason of conduct that rests on a religious belief or a religious practice could not impinge on the religious freedom guaranteed by Article I, sections 2 and 3. Nor do we revive a distinction between constitutional 'rights' and 'privileges." But here it was not the government that disqualified claimant from his job for ingesting peyote. And the rule denying unemployment benefits to one who loses his job for what an employer permissibly considers misconduct, conduct incompatible with doing the job, is itself a neutral rule, as we have said. As long as disqualification by reason of the religiously based conduct is peculiar to the particular employment and most other jobs remain open to the worker, we do not believe that the state is denying the worker a vital necessity in applying the 'misconduct' exception of the unemployment compensation law." 301 Ore. 209, 216, 721 P.2d 445, 448-449 (1986).

Turning to the federal issue, the court reasoned that our decisions in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and *Thomas v. Review Bd., Indiana Employment Security Div.*, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981), required it to hold that the denial of unemployment benefits significantly burdened respondent's religious freedom. The court also concluded that the State's interest in denying benefits was not greater in this case than in *Sherbert* or *Thomas*. This conclusion rested on the premise

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> "The proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake either of parochialism or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law."

See also Linde, *E Pluribus*—Constitutional Theory and State Courts, 18 Ga.L.Rev. 165, 178-179 (1984).

that the Board had erroneously relied on the State's interest in proscribing the use of dangerous drugs rather than just its interest in the financial integrity of the compensation fund. Whether the state court believed that it was constrained by *Sherbert* and *Thomas* to disregard the State's law enforcement interest, or did so because it believed petitioner to have conceded that the legality of respondent's conduct was not in issue, is not entirely clear. The relevant paragraph in the court's opinion reads as follows:

> "Nor is the state's interest in this case a more 'overriding' or 'compelling' interest than in *Sherbert* and *Thomas*. The Board found that the state's interest in proscribing the use of dangerous drugs was the compelling interest that justified denying the claimant unemployment benefits. However, the legality of ingesting peyote does not affect our analysis of the state's interest. The state's interest in denying unemployment benefits to a claimant discharged for religiously motivated misconduct must be found in the unemployment compensation statutes, not in the criminal statutes proscribing the use of peyote. The Employment Division concedes that 'the commission of an illegal act is not, in and of itself, grounds for disqualification from unemployment benefits. ORS 657.176(3) permits disqualification only if a claimant commits a felony in connection with work * * *. [T]he legality of [claimant's] ingestion of peyote has little direct bearing on this case." 301 Ore., at 218-219, 721 P.2d, at 450.

The court noted that although the possession of peyote is a crime in Oregon, such possession is lawful in many jurisdictions.[10]

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[10] The court commented in a footnote:

> "Under ORS 475.992(4) and OAR 855-80-020, the possession of peyote is a crime. Peyote (*Lophophora williamsii*) is a cactus that 'contains a number of active alkaloids with varying properties; the chief hallucinogen among these alkaloids is mescaline." Note, *Hallucinogens*, 68 Colum L.Rev. 521, 525 (1968). The Oregon Court of Appeals, construing a previous statute, has held that

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In its opinion in *Black*, the court rejected the court of appeals' conclusion that the case should be remanded for factual findings on the religious character of respondent's peyote use. Although the referee's findings concerning the use of peyote were somewhat sparse, the court found them sufficient to support the conclusions that the Native American Church is a recognized religion, that peyote is a sacrament of that church, and that respondent's beliefs were sincerely held. The court noted that other courts had acknowledged the role of peyote in the Native American Church and quoted at length from a decision of the California Supreme Court.[11] This

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> religious users of peyote are not exempt from criminal sanctions. *State v. Soto*, 21 Or App 794, 537 P2d 142 (1975), *cert den* 424 US 955, [96 S.Ct. 1431, 47 L.Ed.2d 361] (1976). The federal government and several states exempt the religious use of peyote through caselaw, statute or regulation. *See State v. Whittingham*, 19 Ariz App 27, 504 P2d 950 (1973), *cert den* 417 US 946 (1974); *People v. Woody*, 61 Cal2d 716, 40 Cal Rptr 69, 394 P2d 813 (1964); *Whitehorn v. State*, 561 P2d 539 (Okla Crim App 1977); 21 CFR § 1307.31 (1985); Iowa Code Ann § 204.204(8) (1986); NM Stat Ann § 30-31-6(D) (1980); SD Comp Laws Ann § 34-20B-14(17) (1977); Tex Stat Ann 4476-15 § 4.11 (1976)." 301 Ore., at 219, n. 2, 721 P.2d, at 450, n. 2.

[11] 301 Ore. 221, 225-227, 721 P.2d 451, 453-454 (1986), quoting *People v. Woody*, 61 Cal.2d 716, 720-721, 40 Cal.Rptr. 69, 73-74, 394 P.2d 813, 817-818 (1964):

> " 'Peyote, as we shall see, plays a central role in the ceremony and practice of the Native American Church, a religious organization of Indians. Although the church claims no official prerequisites to membership, no written membership rolls and no recorded theology, estimates of its membership range from 30,000 to 250,000, the wide variance deriving from differing definitions of a "member." As the anthropologists have ascertained through conversations with members, the theology of the church combines certain Christian teachings with the belief that peyote embodies the Holy Spirit and that those who partake of peyote enter into direct contact with God.
>
> " 'Peyotism discloses a long history. A reference to the religious use of peyote in Mexico appears in Spanish historical sources as early as 1560. Peyotism spread from Mexico to the United States and Canada; American anthropologists describe it as well established in this country during the latter part of the nine-

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teenth century. Today, Indians of many tribes practice Peyotism. Despite the absence of recorded dogma, the several tribes follow surprisingly similar ritual and theology; the practices of Navajo members in Arizona practically parellel those of adherents in California, Montana, Oklahoma, Wisconsin, and Saskatchewan.

" 'The "meeting," a ceremony marked by the sacramental use of peyote, composes the cornerstone of the peyote religion. The meeting convenes in an enclosure and continues from sundown Saturday to sunrise Sunday. To give thanks for the past good fortune or find guidance for future conduct, a member will "sponsor" a meeting and supply to those who attend both the peyote and the next morning's breakfast. The "sponsor" usually but not always the "leader," takes charge of the meeting; he decides the order of events and the amount of peyote to be consumed. Although the individual leader exercises an absolute control of the meeting, anthropologists report a striking uniformity of its ritual.

" 'A meeting connotes a solemn and special occasion. Whole families attend together, although children and young women participate only by their presence. Adherents don their finest clothing, usually suits for men and fancy dresses for the women, but sometimes ceremonial Indian costumes. At the meeting the members pray, sing, and make ritual use of drum, fan, eagle bone, whistle, rattle and prayer cigarette, the symbolic emblems of their faith. The central event, of course, consists of the use of peyote in quantities sufficient to produce an hallucinatory state.

" 'At an early but fixed stage in the ritual the members pass around a ceremonial bag of peyote buttons. Each adult may take four, the customary number, or take none. The participants chew the buttons, usually with some difficulty because of extreme bitterness; later, at a set time in the ceremony any member may ask for more peyote; occasionally a member may take as many as four more buttons. At sunrise on Sunday the ritual ends; after a brief outdoor prayer, the host and his family serve breakfast. Then the members depart. By morning the effects of the peyote disappear; the users suffer no after-effects.

" 'Although peyote serves as a sacramental symbol similar to bread and wine in certain Christian churches, it is more than a sacrament. Peyote constitutes in itself an object of worship; prayers are directed to it much as prayers are devoted to the Holy Ghost. On the other hand, to use peyote for nonreligious purposes in sacrilegious. Members of the church regard peyote also as a "teacher" because it induces a feeling of brotherhood with other members; indeed, it enables the participant to experience the Deity. Finally, devotees treat peyote as a "protector." Much as a Catholic carries his medallion, an Indian G.I. often wears around his neck a beautifully beaded pouch containing one large peyote button." (Footnote omitted.)

(Text continued from page App-17)

extensive quotation from an opinion that explains why the religious use of peyote is permitted in California raises the question whether the Oregon court might reach a similar conclusion.

II

Respondents contend that the sacramental use of small quantities of peyote in the Native American Church is comparable to the sacramental use of small quantities of alcohol in Christian religious ceremonies. Even though the State may generally prohibit the use of hallucinogenic drugs and alcohol for recreational purposes and strictly regulate their use for medicinal purposes, respondents assert that the Constitution requires some measure of accommodation for religious use. Alternatively, they argue that Oregon's general prohibition against the possession of peyote is not applicable to its use in a genuine religious ceremony. Even if peyote use is a crime in Oregon, since the State does not administer its unemployment compensation program for law enforcement purposes, they conclude that our decisions in *Sherbert* and *Thomas* require that they be awarded benefits.

The Oregon Supreme Court agreed with respondents' conclusion, but it did not endorse all of their reasoning. The state court appears to have assumed, without specifically deciding, that respondents' conduct was unlawful. That assumption did not influence the court's disposition of the cases because, as a matter of state law, the commission of an illegal act is not itself a ground for disqualifying a discharged employee from benefits. It does not necessarily follow, however, that the illegality of an employee's misconduct is irrelevant to the analysis of the federal constitutional claims. For if a State has prohibited through the criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct.

There is no absolute "constitutional right to unemployment benefits on the part of all persons whose religious convictions are the cause of their unemployment." *Sherbert v. Verner*, 374 U.S. 398, 409-410, 83 S.Ct. 1790, 1797, 10 L.Ed.2d 965 (1963). On three separate occasions, however, we have held that an employee who is required to choose between fidelity to religious belief and cessation of work may not be denied unemployment compensation because he or she is faithful to the tenets of his or her church. As we explained in *Sherbert*:

> "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Id.*, at 404, 83 S.Ct., at 1794.

In *Sherbert*, as in *Thomas* and *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. ___, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987), the conduct that gave rise to the termination of employment was perfectly legal;[12] indeed, the Court assumed that it was immune from state regulation.[13]

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[12] In *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), the appellant was discharged because she would not work on Saturday, the Sabbath Day of her faith. When the petitioner in *Thomas v. Review Bd., Indiana Employment Security Div.*, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981), was required to work on turrets for military tanks, he terminated his employment because his religious beliefs prevented him from participating in the production of war materials. And in *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. ___, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987), the appellant's religion precluded work between sundown on Friday and sundown on Saturday; she was discharged because she therefore could not work all of her scheduled shifts.

[13] The distinction between the absolute constitutional protection against governmental regulation of religious beliefs on the one hand, and the qualified protection against the regulation of religiously motivated conduct, on the other, was carefully explained in our opinion in *Sherbert*:

> "The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such,

(Footnote continued on next page)

The results we reached in *Sherbert*, *Thomas*, and *Hobbie* might well have been different if the employees had been discharged for engaging in criminal conduct. We have held that bigamy may be forbidden, even when the practice is dictated by sincere religious convictions. *Reynolds v. United States*, 98 U.S. (8 Otto) 145, 25 L.Ed. 244 (1879). If a bigamist may be sent to jail despite the religious motivation for his misconduct, surely a State may refuse to pay unemployment compensation to a marriage counselor who is discharged because he or she entered into a bigamous relationship. The protection that the First Amendment provides to "*legitimate* claims to the free exercise of religion," see *Hobbie*, 480 U.S. at ___, 107 S.Ct., at 1050 (emphasis added), does not extend to conduct that a State has validly proscribed.

(Footnote continued from previous page)

> *Cantwell v. Connecticut*, 310 U.S. 296, 303, [60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940)]. Government may neither compel affirmation of a repugnant belief, *Torcaso v. Watkins*, 367 U.S. 488 [81 S.Ct. 1680, 6 L.Ed.2d 982 (1961)]; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, *Fowler v. Rhode Island*, 345 U.S. 67 [73 S.Ct. 526, 97 L.Ed. 828 (1953)]; nor employ the taxing power to inhibit the dissemination of particular religious views, *Murdock v. Pennsylvania*, 319 U.S. 105 [63 S.Ct. 870, 87 L.Ed. 1292 (1943)]; *Follett v. McCormick*, 321 U.S. 573 [64 S.Ct. 717, 88 L.Ed. 938 (1944)]; cf. *Grosjean v. American Press Co.*, 297 U.S. 233, [56 S.Ct. 444, 80 L.Ed. 660 (1936)]. On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.' *Braunfeld v. Brown*, 366 U.S. 599, 603 [81 S.Ct. 1144, 1146, 6 L.Ed.2d 563 (1961)]. The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order. *See, e.g.*, *Reynolds v. United States*, 98 U.S. [8 Otto] 145 [25 L.Ed. 244 (1879)]; *Jacobson v. Massachusetts*, 197 U.S. 11 [25 S.Ct. 358, 49 L.Ed. 643 (1905)]; *Prince v. Massachusetts*, 321 U.S. 158 [64S.Ct. 438, 88 L.Ed. 645 (1944)]; *Cleveland v. United States*, 329 U.S. 14 [67 S.Ct. 13, 91 L.Ed. 12 (1946)].
>
> "Plainly enough, appellant's conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation." 374 U.S., at 402-403, 83 S.Ct, at 1793.

Neither the Oregon Supreme Court nor this Court has confronted the question whether the ingestion of peyote for sincerely held religious reasons is a form of conduct that is protected by the Federal Constitution from the reach of a State's criminal laws. It may ultimately be necessary to answer that federal question in this case, but it is inappropriate to do so without first receiving further guidance concerning the status of the practice as a matter of Oregon law.[14] A substantial number of jurisdictions have exempted the use of peyote in religious ceremonies from legislative prohibitions against the use and possession of controlled substances.[15] If Oregon is one of those States, respondents' conduct may well be entitled to constitutional protection. On the other hand, if Oregon does prohibit the religious use of peyote, and if that prohibition is consistent with the Federal Constitution, there is no federal right to engage in that conduct in Oregon. If that is the case, the State is free to withhold unemployment compensation from respondents for engaging in work-related misconduct, despite its religious motivation. Thus, paradoxical as it may first appear, a necessary predicate to a correct evaluation of respondents' federal claim is an understanding of the legality of their conduct as a matter of state law.

Relying on the fact that Oregon statutes prohibit the possession of peyote, see Ore. Rev. Stat. § 475.992(4) (1987), rather than its use, and the further fact that the Oregon Court of Appeals held that the ingestion of a controlled substance

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[14] See nn. 10 and 11, *supra*.

[15] See 21 CFR § 1307.31 (1987) (exempting use of peyote in bona fide religious ceremonies of the Native American Church); Iowa Code § 204.204(8) (1985) (same); N.M.Stat.Ann. § 30-31-6(D) (1987) (exempting use of peyote in bona fide religious ceremonies by bona fide religious organizations); S.D. Codified Laws § 34-20B-14(17) (1987) (exempting sacramental use of peyote in services of the Native American Church); Tex.Rev.Civ.Stat.Ann., Art. 4476-15 § 4.11 (Supp. 1988)(exempting use of peyote by Native American Church members with not less than 25% Indian blood in bona fide religious ceremonies). These authorities were cited by the Oregon Supreme Court. Ser n. 10, *supra*.

into the blood stream did not constitute "possession" within the meaning of the predecessor statute, *State v. Downes*, 31 Ore.App. 1183, 572 P.2d 1328 (1977), respondents argue that their ceremonial use of the drug was not unlawful.[16] The Attorney General of the State advises us that this argument is without merit. But in the absence of a definitive ruling by the Oregon Supreme Court we are unwilling to disregard the possibility that the State's legislation regulating the use of controlled substances may be construed to permit peyotism or that the State's constitution may be interpreted to protect the practice.[17] That the Oregon Supreme Court's opinions in these cases not only noted that other States "exempt the religious use of peyote through caselaw,"[18] but also quoted extensively from a California opinion that did so, lends credence to the possibility that this conduct may be lawful in Oregon.

Because we are uncertain about the legality of the religious use of peyote in Oregon, it is not now appropriate for us to decide whether the practice is protected by the Federal Constitution. See *Ashwander v. TVA*, 297 U.S. 288, 346-347, 56 S.Ct. 466, 482-483, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). The possibility that respondent's conduct would be unprotected if it violated the State's criminal code is, however, sufficient to counsel against affirming the state court's holding that the Federal Constitution requires the award of benefits to these respondents. If the Oregon Supreme Court's holding rests on the unstated premise that respondents' conduct is entitled to the same measure of federal constitutional protection regardless of its criminality, that holding is erroneous. If, on the other hand, it rests on the unstated premise that the conduct is not unlawful in Oregon, the explanation of that premise would make it more difficult to distinguish our holdings in *Sherbert*, *Thomas*, and *Hobbie*. We therefore vacate the judgments of the Oregon Supreme Court and remand the cases for further proceedings not inconsistent with this opinion.

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[16] At the time *Downes* was decided, Oregon law prosecribed both the use and possession of controlled substances. In 1977, the Oregon Legislature passed the Uniform Controlled Substances Act, Ore.Rev.Stat. § 475.005 *et seq.* (1987), which repealed the use and possession statutes discussed in *Downes* and enacted a provision that addresses only the possession of controlled substances. See § 475.992(4).

[17] Our concern, of course, is not with whether some fact unique to respondents' cases bars their prosecution, but with whether Oregon law provides a general exemption from the scope of its criminal laws for the religious use of peyote.

[18] See, n. 10, *supra*.

It is so ordered.

Justice KENNEDY took no part in the consideration or decision of this case.

Justice BRENNAN, with whom Justice MARSHALL and Justice BLACKMUN join, dissenting.

Respondents Smith and Black were fired for practicing their religion. The Employment Division of the Oregon Department of Human Resources deemed respondents' worship "misconduct connected with work," Ore. Rev. Stat. § 657.176(2)(a) (1987), and accordingly denied them unemployment benefits. Citing a "compelling state interest . . . in the proscription of illegal drugs," the Employment Appeals Board rejected the assertion that the Free Exercise Clause prohibited the denial of unemployment benefits to an employee discharged for religious use of peyote. App. to Pet. for Cert. in No. 86-946, p. A20. The Oregon Supreme Court, disavowing any state interest in enforcing its criminal laws through the denial of unemployment benefits, found the State's interest indistinguishable from those asserted in *Sherbert v. Verner*, 374 U.S. 398, 403, 83 S.Ct. 1790, 1793, 10 L.Ed.2d 965 (1963), and *Thomas v. Review Bd., Indiana Employment Security Div.*, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981). On the authority of those cases it held that the denial violated respondents' First Amendment right to exercise their religion freely. *Smith v. Employment Division*, 301 Ore. 209, 212, 721 P.2d 445, 446 (1986); *Black v. Employment Division*, 301 Ore. 221, 721 P.2d 451 (1986). This Court today strains the state court's opinion to transform the straightforward question that is presented into a question of first impression that is not.

A generation ago, we established that a State may not deny unemployment benefits to an employee discharged for her adherence to religious practices unless the "incidental burden on the free exercise of [her] religion [is] justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate. . . .' " *Sherbert, supra*, 374 U.S., at 403, 83 S.Ct., at 1793 (citation omitted). In *Thomas, supra*, and again as recently as last Term, see *Hobbie v. Unemployment Appeals Comm'n of Fla*, 480 U.S. ___. 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987), we reaffirmed *Sherbert*'s holding that, where the " 'state . . . denies . . . a benefit because of conduct mandated by religious belief,' " the resultant burden on the free exercise of religion "must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest." 480 U.S., at ___, 107 S.Ct., at 1049 (quoting *Thomas, supra*, 450 U.S., at 717-718, 101 S.Ct., at 1431-1432 (emphasis omitted). Where the burden on religion is imposed pursuant to a statute, we have an independent obligation to ascertain that the legislature in fact intended to advance the asserted interest through the statutory scheme. Cf. *Sherbert, supra*, 374 U.S., at 407, 83 S.Ct., at 1795-1796. We may not, particularly when engaging in strict scrutiny, blindly accept the interest that the State asserts in court. See, *e.g.*, *Mississippi University for Women v. Hogan*, 458 U.S. 718, 730, 102 S.Ct. 3331, 3339, 73 L.Ed.2d 1090 (1982) (all-women state school fails intermediate scrutiny because, "although the State recited a 'benign compensatory purpose,' it failed to establish that the alleged objective is the actual purpose underlying the discriminatory [statutory] classification") (footnote omitted); *Hampton v. Mow Sun*

Wong, 426 U.S. 88, 103-104, 96 S.Ct. 1895, 1905-1906, 48 L.Ed.2d 495 (1976) ("When the Federal Government asserts an overriding national interest as justification for a discriminatory rule . . . , due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest"); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648, n. 16, 95 S.Ct. 1225, 1233, n. 16, 43 L.Ed.2d 514 (1975) (under rationality review, "[t]his Court need not . . . accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation").

Smith and Black—like Sherbert, Thomas, and Hobbie—were discharged from their employment because their religious practices conflicted with their employer's interests. The only difference between the cases before us and the situations we faced in *Sherbert*, *Thomas*, and *Hobbie* is that here the Employment Division has asserted in court a " 'compelling state interest . . . in the proscription of illegal drugs,' " not merely the interest in avoiding the financial " 'burden upon the Unemployment Compensation Trust Fund' " that we found not compelling in *Sherbert*. *Smith*, *supra*, 301 Ore., at 212, 721 P.2d, at 446 (quoting opinion of Employment Appeals Board). Such an interest in criminal law enforcement would present a novel issue if it were in fact an interest that Oregon had sought to advance in its unemployment compensation statute.

Far from validating any such state interest, however, the State's highest court has disavowed it. In the paragraph that this Court quotes at length, *ante*, at 1448, the Oregon Supreme Court could scarcely have been clearer. The state court understood that the Employment Division may not overcome the burden on religion by invoking a theoretically plausible interest that in fact the state legislature had no intention of furthering when it enacted the unemployment compensation statute: "The state's interest in denying unemployment benefits to a claimant discharged for religiously motivated misconduct must be found in the unemployment compensation statutes, not in the criminal statutes proscribing the use of peyote." *Smith*, *supra*, at 219, 721 P.2d at 450 (footnote omitted); see also *Black*, *supra* (relying on *Smith*'s analysis). The state court could find no legislative intent expressed in the unemployment statute to reinforce criminal drug-abuse laws. Although we are bound by a state court determination that a state legislature was actually motivated by a particular validating purpose, see *Stone v. Graham*, 449 U.S. 39, 41, 101 S.Ct. 192, 193-194, 66 L.Ed.2d 199 (1980), we have never attributed to a state legislature a validating purpose that the State's highest court could find nowhere in the statute. To do so would be inconsistent with our responsibility to scrutinize strictly state-imposed burdens on fundamental rights. At any rate, this Court offers no reason to discount the Oregon Supreme Court's disavowal of the validating purpose. Nor has Employment Division asserted any further interest other than those that *Sherbert*, *Thomas*, and *Hobbie* have rejected. I would therefore affirm the Oregon Supreme Court.

The Court avoids this straightforward analysis, proclaiming instead that it has difficulty discerning "[w]hether the state court believed that it was constrained by *Sherbert* and *Thomas* to disregard the State's law enforcement interest, or did so because it believed petitioner to have conceded that the legality of respondent's conduct was not in issue," *ante*, at 1448. The difficulty, however, is entirely of this Court's own making, for it poses two entirely implausible interpretations of the opinions below and overlooks the only natural one.

The Oregon Supeme Court both introduced and concluded the relevant passage by stressing the *similarity* between the state interests asserted here and those asserted in *Sherbert* and *Thomas*. See *Smith*, *supra*, 301 Ore., at 218, 721 P.2d, at 450 (the "state's interest in this case [is no] more 'overriding' or 'compelling' . . . than in *Sherbert* and *Thomas*"); *id.*, at 219-220, 721 P.2d, at 450-451 ("The state's interest is simply the financial interest in the payment of benefits from the unemployment insurance fund to this claimant and other claimants similarly situated," which "*Sherbert* and *Thomas* did not find . . . 'compelling' when weighed against the free exercise rights of the claimant"). At no point in the comparision did the state court suggest, as this Court's first alternative interpretation does, that it could discern an additional state interest in enforcing criminal drug-abuse laws) that *Sherbert* and *Thomas* "constrained" it to "disregard." Moreover, the state court did not so much as suggest why *Sherbert* and *Thomas* would so constrain the State. Even the State's attorney could not in good conscience offer the interpretation that this Court adopts, without the caveat "that it is not entirely apparent from the face of the opinion," Tr. of Oral Arg. 7.

Nor is it accurate to read the passage, as this Court's second alternative interpretation does, as merely binding the Employment Division to a concession "that the legality of respondent's conduct was not in issue." The Employment Division conceded only the patently obvious point that the asserted interest in criminal law enforcement is nowhere to "be found in the unemployment compensation statutes," 301 Ore., at 219, 721 P.2d, at 450, and that the legality of peyote use was therefore irrelevant to the determination whether the *statute* purported to deny benefits. The Employment Division hotly disputed the proposition that it could not answer respondents' *free exercise challenge* by asserting an interest that appears nowhere in its unemployment compensation scheme. The very passage that the Court quotes demonstrates as much: "The Board found that the state's interest in proscribing the use of dangerous drugs was the compelling interest that justified denying the claimant unemployment benefits." *Smith*, 301 Ore., at 218-219, 721 P.2d, at 450. The

remand in these cases thus rests on a purported ambiguity that has no basis in the opinions below.

Perhaps more puzzling than the imagined ambiguity is the Court's silence as to its relevance. The Court merely remands these cases to the Oregon Supreme Court for further proceedings after concluding that a "necessary predicate" to its analysis is a pronouncement by the state court on whether respondents' conduct was criminal. *Ante*, at 1452. It seems to me that the state court on remand could readily resolve this case without reaching that issue. The Court has expressed no intention to depart from the long-standing rule that, in strictly scrutinizing state-imposed burdens on fundamental rights, courts may not assert on a State's behalf interests that the State does not have. See *supra*, at 1452-1453. Accordingly, I must assume that the Court has tacitly left the Oregon Supreme Court the option to dispose of these cases by simply reiterating its initial opinion and appending, "And we really mean it," or words to that effect.

A slot on this Court's calendar is both precious and costly. Inevitably, each Term this Court discovers only after painstaking briefing and oral argument that some cases do not squarely present the issues that the Court sought to resolve. There is always the temptation to trivialize the defect and decide the novel case that we *thought* we had undertaken rather than the virtual clone of precedent that we *actually* undertook. Here, however, the Court's belated effort to recoup sunk costs is not worth the price. Today's foray into the realm of the hypothetical will surely cost us the respect of the State Supreme Court whose words we misconstrue. That price is particularly exorbitant where, as here, the state court is most likely to respond to our efforts by merely reiterating what it has already stated with unmistakable clarity.

I dissent.

OPPOSITION
BRIEF

②

Supreme Court, U.S.
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No. 88-1213

In The

Supreme Court of the United States

October Term, 1988

◆

EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF OREGON,
W.E. HUNTER, ADMINISTRATOR

Petitioner,

v.

ALFRED L. SMITH,
GALEN W. BLACK, AND ADAPT,

Respondents.

◆

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

◆

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QUESTIONS PRESENTED

1. In considering whether the state has shown sufficient justification under the First Amendment for denying unemployment benefits to persons discharged for religiously motivated conduct, can federal law *require* a state court to treat as relevant the fact that such conduct is prohibited by the state's criminal law?

2. Should the Court review a state court's decision invalidating, on federal grounds, a state criminal law that has not been applied to the parties to the litigation, where reversal of the state court's decision would not change the result in this case for these parties?

3. Must a state court treat as "compelling" for purposes of First Amendment analysis the state's asserted interest in criminalizing certain religiously-motivated conduct?

4. Would the fact that a state has shown sufficient justification for criminalizing certain religiously-motivated conduct relieve the state of any duty under the First Amendment to justify as precisely drawn *other* burdens it may seek to impose for engaging in that conduct?

TABLE OF CONTENTS

Page

Questions Presented i

Statutes and Regulations Involved: Respondents' Supplement 1

Statement of the Case: Respondents' Supplement... 1

Reasons for Denying Writ 3

- I. The Oregon Supreme Court has decided as a matter of state law that the illegality of religiously motivated use of peyote is irrelevant to the award of unemployment benefits under state law 3
- II. Petitioners are requesting this Court to issue an advisory opinion on the federal constitutional questions 5
- III. This proceeding is not of national importance, and its value as precedent will be limited to a small number of adherents in Oregon 7
- IV. The decision of the Oregon Supreme Court on remand is not in conflict with the decisions of other courts 7
- V. The Oregon Supreme Court decided as a matter of state law that there is no compelling state interest justifying criminal proscription of the religious use of peyote by members of the Native American Church 8
- VI. Reversal of the Oregon Supreme Court's decision will have no effect on respondents since the state court's interpretation of state controlled substances possession laws to include use of such substance was unexpected 10

Conclusion 10

Appendix A .... App. 1

Appendix B .... App. 6

TABLE OF AUTHORITIES

Page

CASES:

Black v. Employment Div., 301 Or. 221, 721 P.2d 451 (1986) 8

EEOC v. ADAPT, Civ. No. C85-6139-E (D. Or. March 5, 1986) 2

Employment Div., Dept. of Human Res. v. Smith, 485 U.S. 99 L.Ed.2d 753, 108 S.Ct. 1444 (1988) 6

Glide Lumber Products Co. v. Employment Division, 86 Or. App. 699, 741 P.2d 907 (1987) 4, 6

Hobbie v. Unemployment Appeals Commission of Fla., 480 U.S. ___, 94 L.Ed. 2d 190, 107 S.Ct. 1046 (1987) 6, 9, 10

In re Ruffalo, 390 U.S. 544 (1968) 10

People v. Woody, 61 Cal. 2d 716, 722, 40 Cal. Rptr. 69, 394 P.2d 813 (1964) 2, 7, 8, 9

Sherbert v. Verner, 374 U.S. 398 (1963) 4, 6, 9, 10

Smith v. Employment Division, 301 Or. 209, 721 P.2d 445 (1986) .... *passim*

Smith v. Employment Division, 307 Or. 68, 763 P.2d 146 (1988) .... *passim*

State v. Downes, 31 Or. App. 1183, 572 P.2d 1328 (1977) 10

Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981) 4, 6, 9, 10

Wisconsin v. Yoder, 406 U.S. 205 (1972) 8, 9, 10

TABLE OF AUTHORITIES–Continued

Page

FEDERAL STATUTES:

The American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 1

21 U.S.C. § 812(c) 7

STATE STATUTES:

ORS 657.176 .... 4, 6

REGULATIONS:

21 C.F.R. § 1307.31 .... 1, 7

STATUTES AND REGULATIONS INVOLVED: RESPONDENTS' SUPPLEMENT.

The American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996, provides:

> Henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

Pursuant to 21 C.F.R. § 1307.31:

> **Native American Church**
> The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration. Any person who manufactures peyote for or distributes peyote to the Native American Church, however, is required to obtain registration annually and to comply with all other requirements of law.

◆

STATEMENT OF THE CASE: RESPONDENT'S SUPPLEMENT.

Petitioners' statement of the facts in this case is somewhat selective, and does not include relevant events which affect the principles discussed in the Court's prior decision. Respondents disagree with petitioners' characterization of the prior decisions in this case by both this Court and the Oregon Supreme Court, but will not discuss petitioners' errors except as relevant to the opposition.

The case presently before this Court will never come up again in Oregon. Respondents' employer, ADAPT, entered into a federal consent decree in which it agreed that religious use of peyote by Native American Church members would no longer be considered work-related misconduct. *EEOC v. ADAPT,* Civ. No. C85-6139-E (D.Or., March 5, 1986). App. 1. Based on this decree, respondents and others in similar situations will never again be fired for "misconduct" for the events that occured in the present case.

On remand from this Court's prior opinion, the Oregon Supreme Court, in analyzing the federal constitutional question, found expressly that "[t]he experience of states that exempted bona fide religious use of peyote from the prohibition did not support any compelling state interest in suppressing it." *Smith v. Employment Div.,* 307 Or. 68, 74, 763 P.2d 146, 148 (1988) (*citing People v. Woody,* 61 Cal. 2d 716, 722, 40 Cal. Rptr. 69, 394 P.2d 813 (1964)). This finding has not been controverted by any credible evidence.

On September 25, 1987, the Oregon State Board of Pharmacy adopted a permanent rule exempting non-drug use of peyote in bona fide ceremonies of the Native American Church from Schedule I of Oregon's Controlled Substances Act, which makes possession of peyote a Class B felony. On October 14, 1987, the Board issued an order suspending the permanent rule at the urging of the state attorney general's office, who questioned the constitutionality of granting an exemption to a particular church. App. 6.

REASONS FOR DENYING THE WRIT

The state statute criminalizing the possession and use of peyote invalidated by the Oregon court under the First Amendment has not been applied to these litigants. Under the court's decision, it could not be applied to respondents in the context of an unemployment compensation proceeding. The Oregon Supreme Court invalidated the state statute in an advisory opinion rendered at the behest of this Court. Reversing the Oregon court's decision will have no effect on the eligibility of the respondents for unemployment benefits under Oregon law. It would be extraordinary for this Court to review a state court decision so entirely abstract in nature.

I. The Oregon Supreme Court has decided as a matter of state law that the criminality of religiously motivated use of peyote is irrelevant to the award of unemployment benefits under state law.

The fundamental source of the petitioners' displeasure with the decision of the Oregon Supreme Court on remand is the court's holding that it was inappropriate for an executive branch agency to seek to advance the state's interest in proscribing the use of dangerous drugs through its unemployment compensation statutes, *Smith v. Employment Division,* 307 Or. 68, 71, 763 P.2d 146, 147 (1988), *citing Smith v. Employment Division,* 301 Or. 209, 218-19, 721 P.2d 445 (1986). The Oregon Supreme Court decided that the only state interest in denying unemployment benefits to a claimant discharged for religiously motivated misconduct is protecting the financial integrity of the unemployment interest fund. *Id.*

As a matter of state law, the legality of ingesting peyote has little bearing in and of itself on claimants' qualification for unemployment benefits. *See* ORS 657.176(3). Petitioners would have it otherwise, but the Oregon Supreme Court has twice rejected petitioners' arguments. Petitioners assert that "[t]he Oregon Supreme Courts' decision is bereft of any reference to the state's regulatory interest," Pet. for Writ of Cert., p.11, but this issue does not rise to the level of a federal constitutional question to be decided by this Court.

In its prior decision this Court seemed unsure whether the Oregon Supreme Court disregarded the state's law enforcement interest in proscribing dangerous drugs because it believed it was constrained by this Court's holdings in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981), or because "it believed petitioner to have conceded that the legality of respondent's conduct was not in issue. . . ." 485 U.S. at ___, 99 L.Ed. 2d at 761. On remand the Oregon Supreme Court made clear that under state law the state's law enforcement interest in proscribing the use of peyote was immaterial to Oregon's unemployment compensation laws, not just that petitioners had conceded the issue, 307 Or. at 71, 763 P.2d at 147. Several Oregon appellate decisions have declined to allow the state to advance its law enforcement interests through the state unemployment compensation scheme. *E.g., Glide Lumber Products Co. v. Employment Division*, 86 Or. App. 669, 741 P.2d 907 (1987).

This Court cannot compel Oregon's courts to treat the state's law enforcement interests as relevant in making unemployment benefits determination.

II. Petitioners are requesting this Court to issue an advisory opinion on the federal constitutional question.

Since this Court's 1988 opinion in this case a number of events have occurred which have extinguished its status as an "actual case or controversy." Resolution of the question posed to this Court by petitioners will have no effect on the receipt of unemployment benefits by respondents because of their discharge by ADAPT.

The Oregon Supreme Court refused to give an advisory opinion on whether proscription by the state of the religious use of peyote would violate the Oregon Constitution, in the absence of an actual criminal prosecution. *Smith v. Employment Div.*, 307 Or. at 73 n.3; 763 P.2d at 148 n.3. This Court should decline to issue an advisory opinion on the federal constitutional question in the similar absence of an actual controversy. This is not a "fact unique to respondents' cases" which bars only their prosecution, 485 U.S. at ___ n.17, 99 L.Ed. 2d at 765 n.17, but an obstacle to judicial review of anyone's religious use of peyote in the absence of a valid criminal prosecution. No such prosecution in this case has occurred, and petitioners have made no showing that any future prosecution of the religious use of peyote is planned.

The "unique facts" alluded to by this Court in its prior opinion which might bar prosecution of respondents appears to be a reference to this Court's uncertainty over whether the Oregon unemployment scheme made the criminality of the conduct in this case irrelevant to the determination of unemployment eligibility, or whether petitioners had inadvertently conceded that argument only in the present case. 485 U.S. at ___; 99 L.Ed. 2d at 761.

On remand the Oregon Supreme Court confirmed that it had *decided* "that it was immaterial to Oregon's unemployment compensation law whether the use of peyote violated some other law," 307 Or. at 71, 673 P.2d at 147, and stated unequivocally that the state unemployment procedure is not designed or equipped to determine guilt or innocence of an uncharged and untried crime. 307 at 73 n.3, 673 P.2d at 148 at n.3. *See Glide Lumber Products Co. v. Employment Div.*, 86 Or. App. 669, 741 P.2d 907 (1987) (off-duty drug use does not disqualify claimant from unemployment benefits). In the absence of a determination of state constitutional issues, this Court should decline to issue an advisory opinion on federal constitutional questions.

Other factors show that any determination by this Court would be advisory. For example, as discussed above, respondent ADAPT entered into a federal consent decree recognizing that religious use of peyote will no longer be considered misconduct justifying discharge of an employee. App-1. Removal of "misconduct" as an issue in the present case removes any justification for withholding unemployment benefits from respondents under the Oregon unemployment scheme. ORS 657.176(2)(a). Removal of misconduct as an issue also alters the analysis previously undertaken by this Court and makes the present case difficult to distinguish from the holdings of *Sherbert*, *Thomas*, and *Hobbie v. Unemployment Comm'n of Florida*, 480 U.S. ___, 94 L.Ed.2d 190, 107 S.Ct. 1046 (1987). *See Employment Div., Dept. of Human Res. v. Smith*, 485 U.S. at ___, 99 L.Ed. 2d at 766; *Sherbert v. Verner*, 374 U.S. at 402 n.2. Under these facts, there is no reason for this Court to review the present case again.

III. This proceeding is not of national importance, and its value as precedent will be limited to a small number of adherents in Oregon.

As pointed out by the Oregon Supreme Court on remand in this case, the sacramental use of peyote is exempted from criminal proscription by at least 23 states. 307 Or. at 73 n.2, 763 P.2d at 148 n.2. These states, primarily located in the western United States, hold an overwhelming percentage of the Indian population of this country as well as most of the adherents of the Native American Church. Religious use of peyote by members of the Native American Church is also exempt from federal prosecution. 21 U.S.C. § 812(c); 21 C.F.R. § 1307.31. Oregon and Idaho stood alone in the western tier of states in not granting such an exemption until the Oregon Supreme Court reversed the state's position in its remand opinion. (California has a judicial exemption for religious use of peyote under *People v. Woody*, 40 Cal. Rptr. 69, 394 P.2d 813 (1964)). Denying review in the present case will not affect a large group of people.

IV. The decision of the Oregon Supreme Court on remand is not in conflict with the decisions of other courts.

The decision of the Oregon Supreme Court on remand in *Smith v. Employment Division* brought Oregon into accord with the rest of the western states which have exempted the religious use of peyote by members of the Native American Church from criminal proscription.

There are no decisions in conflict with this holding. Certainly there are no conflicts in decisions from jurisdictions with significant Native American Church followings or in cases in which the Native American Church was a party. At most this case presents a unique factual situation similar to that of the Amish faith in *Wisconsin v. Yoder*, where the special treatment of a particular religion was tied to the special history of that religion. *See, People v. Woody*, 40 Cal. Rptr. 69, 394 P.2d 813 (1964). It has no demonstrated general effect on other religions.

V. The Oregon Supreme Court decided as a matter of state law that there is no compelling state interest justifying criminal proscription of the religious use of peyote by members of the Native American Church.

In all of its opinions in this matter, the Oregon Supreme Court has relied on and affirmed the decision of the California Supreme Court addressing religious use of peyote in *People v. Woody*, 40 Cal. Rptr. 69, 394 P.2d 813 (1964). *Smith v. Employment Div.*, 301 Or. 209, 721 P.2d 445 (1986); *Black v. Employment Div.*, 301 Or. 221, 225-27, 721 P.2d 451 (1986); *Smith v. Employment Div.*, 307 Or. 68, 763 P.2d 146 (1988). In the *Woody* case the California Court found no evidence that legitimate claims of religious immunity by members of the Native American Church would in fact preclude effective administration of the controlled substances laws of the state, or that some other form of less restrictive regulation would not accomplish the state's objective. 394 P.2d at 819-20.

The Oregon Supreme Court on remand authoritatively held that the First Amendment prohibits the application of state controlled substances laws to respondents in this case because the state has presented no evidence that its law enforcement interests would be undermined. Despite this affirmation by the Oregon Supreme Court of the California Court's findings in *Woody*, petitioners once again assert unsubstantiated fears that allowing the Oregon Supreme Court's decision on remand to stand will somehow undermine the state's law enforcement interests. Pet. for Cert., p.11. Petitioners attempt to support these assertions by arguing that this Court's prior opinion created a new constitutional test holding that the state proscription of conduct ends the constitutional inquiry in First Amendment cases.

In actuality the Oregon Supreme Court's opinion on remand is entirely consistent with this Court's opinions in *Yoder*, *Sherbert*, *Thomas*, and *Hobbie*. Even where a State has proscribed certain conduct, if such conduct includes religiously motivated conduct the State must still demonstrate that it has a compelling state interest that will be substantially impeded by recognizing the claimed exemption. *E.g., Wisconsin v. Yoder*, 406 U.S. 221. Petitioners failed to meet this burden before the Oregon Supreme Court, and this case therefore presents no new factual or legal issues which merit review by this Court.

VI. Reversal of the Oregon Supreme Court's decision will have no effect on respondents since the state court's interpretation of state controlled substances possession laws to include use of such substance was unexpected.

As discussed in respondents' prior briefs before this Court, Oregon law previously distinguished between use and possession of illegal drugs. *State v. Downes*, 31 Or. App. 1183, 572 P.2d 1328 (1977). Respondents' Brief, pp. 15-17. On remand in the present case the Oregon Supreme Court decided without discussion that the Oregon statute against possession of controlled substance, including peyote, also includes sacramental use of peyote. 307 Or. at 73, 673 P.2d at 148.

It is settled law that the prosecution of a person on the basis of an unexpected interpretation of the law would violate fundamental concepts of notice and due process. *In re Ruffalo*, 390 U.S. 544 (1968). Here the Oregon Supreme Court silently overruled previous state appellate decisions distinguishing between possession and use. Since respondents could not be convicted in any event if the state were to institute criminal proceedings against them because of this unexpected change in the law, reversal of the Oregon Supreme Court's opinion on remand will not have any practical effect on respondents.

CONCLUSION

The opinions of this Court in *Yoder*, *Sherbert*, *Thomas* and *Hobbie* are clear. The Oregon Supreme Court decided as a matter of state law that the state cannot enforce its interest in proscribing controlled substances through the

state unemployment statutes and procedures. The Petition for a Writ of Certiorari should be denied, or the order below summarily affirmed on the merits pursuant to United States Supreme Court Rule 23.1.

Respectfully submitted this 17th day of February, 1989.

Craig J. Dorsay
Counsel for Respondents

APPENDIX A

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
AT EUGENE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	CIVIL NO. C85-6139-E
v.	PROPOSED CONSENT DECREE
DOUGLAS COUNTY COUNCIL ON ALCOHOL AND DRUG ABUSE PREVENTION AND TREATMENT, Defendant.	(Filed March 5, 1986)

Plaintiff Equal Employment Opportunity Commission (hereafter "EEOC" or "the Commission"), an agency of the United States Government, brought this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. section 2000e et seq. (hereafter "Title

VII"), alleging that Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment (hereafter "ADAPT"), discriminated against Al Smith, a Native American, on the basis of his religion by terminating him from his position as a Counselor II. Defendant ADAPT denies the existence of any violation of Title VII and maintains that it has complied with and will continue to comply in all respects with the provisions of Title VII and other laws of the United States.

The plaintiff EEOC and defendant ADAPT being desirous of settling this action agree to this Consent Decree.

The Court having reviewed the record and considered representations of counsel, does hereby find as follows:

(1) This Court has jurisdiction over the parties and the subject matter pursuant to 42 U.S.C. section 2000e et seq.; and

(2) This Consent Decree is intended to and does, effectuate the full, final and complete resolution of all allegations of unlawful employment practices and discrimination contained in the Complaint.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

A. This Consent Decree does not constitute an admission by defendant of any violation of Title VII.

B. Pursuant to the requirements of Title VII, defendant agrees as follows:

1. To engage hereafter in no employment practices which deprive or tend to deprive any individual of

employment opportunities or which discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment on the basis of that individual's religion, in violation of Title VII.

2. To revise or interpret hereafter by resolution all practices of ADAPT to eliminate any discipline against members of the Native American Church for the non-drug sacramental use of peyote during a bona fide ceremony of the Native American Church.

3. To pay by March 4, 1986, at the latest, to Al Smith the gross sum of $15,552.00 as total compensation for any and all claims which he or his assignees may have against the defendant, including any right to reinstatement. This sum of money shall constitute all back wages and interest for the time period of March 1984, to December, 1985. Appropriate deductions for Federal Insurance Contribution Act (i.e., Social Security, FICA) and Federal and Oregon Income Tax will be deducted from this gross total and paid directly to the appropriate governmental agencies by defendant. The remainder of the gross sums will be paid to Al Smith, in the amount of $10,902.00. This sum is calculated as follows:

Gross	$15,552.00
Less: FICA 1984–6.7%; 1985–7.05%	1,073.00
Less: FIT (20%)	3,110.00
Less: O/T (3%)	467.00
Net Payable to Al Smith	$10,902.00

C. This Consent Decree shall not prevent defendant ADAPT from imposing reasonable and job-related standards for hiring any applicant for employment or disciplining any employee, nor from measuring the performance of their duties during the course of their employment.

D. This Consent Decree shall not prevent defendant ADAPT from requiring that no employee shall discuss with, advocate or respond to any client of ADAPT in any way having to do with any matter relating to membership in the Native American Church or the sacramental use of peyote, or the spiritual or other benefits or features of peyote, except that an employee may reasonably respond to inquiry from a client of ADAPT only that the employee has a religion, without naming or describing it, and that the religion provides spiritual support for the sobriety and continuing process of recovery of the employee.

E. The Court shall retain jurisdiction over this action for three (3) years for the purpose of effectuating this Decree.

F. Each party shall bear its own costs and attorney fees pursuant to this Decree.

DATED this 4th day of March, 1986.

/s/ James M. Burns
UNITED STATES
DISTRICT JUDGE

For Plaintiff:

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Opportunity Commission
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APPENDIX B

BEFORE THE BOARD OF PHARMACY
OF THE STATE OF OREGON

In the matter of the suspen-) STATUTORY AUTHOR-
sion of OAR 855-80-027(1)) ITY, STATEMENT OF
exempting use of peyote) NEED AND LIST OF
from Schedule I under cer-) DOCUMENTS RELIED
tain circumstances.) UPON

1. *Citation of Statutory Authority:* ORS 475.035; 183.335.

2. *Need and Justification for Temporary Rule:*

This temporary rule suspends OAR 855-80-027(1), a permanent rule adopted by the Board of Pharmacy at its meeting on September 25, 1987. That rule exempted Native American Church members using peyote from registration requirements and announced that the listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bonafide Native American religious ceremonies. The Board did not file OAR 855-80-027(1) with the Secretary of State because of concerns raised by the Attorney General about the rule's constitutionality. An emergency meeting of the Board was held on October 9, 1987 to reconsider the rule in light of the Attorney General's concerns.

The Board finds that it is in the public interest that OAR 855-80-027(1) be suspended immediately. The Board has been advised by the Attorney General's office that the rule, as written, probably is unconstitutional. The Board concludes that it should seek further advice from the Attorney General on the constitutionality of the rule before the rule is filed and becomes effective. The Attorney General has advised the Board that a policy granting an exemption for religious peyote use to the members of a particular church rather than to all individuals who use peyote pursuant to sincerely held religious convictions probably is unconstitutional. The Attorney General has also advised the Board that any exemption for the religious use of one drug arguably could imperil laws prohibiting the religious use of other drugs. Finally, the Attorney General has urged the Board to carefully examine the question of its statutory authority to create exemptions for particular classes of controlled substance users.

Because of the rule's possible unconstitutionality, because of uncertainty about the Board's authority to create such an exemption, and because the public interest would suffer if the state were required to grant similar exemptions to all citizens who seek to use peyote or other controlled substances for religious reasons, the board finds that serious prejudice to the public will result unless the board repeals this rely immediately.

3. *Documents or Reports Relied Upon:*

The Board, in part, relied upon oral advice from the Attorney General's office presented during the Board's public meeting on October 9, 1987.

DATED: October 14, 1987.

/s/ Ruth Vandever
RUTH VANDEVER
Executive Director
Board of Pharmacy

bjd/1080P

PETITIONER'S

BRIEF

3

Supreme Court, U.S.
FILED
MAY 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1213

In the Supreme Court of the United States

OCTOBER TERM, 1988

EMPLOYMENT DIVISION,
DEPARTMENT OF HUMAN RESOURCES,
of the STATE OF OREGON,
W.E. HUNTER, Administrator,
Petitioners,

v.

ALFRED L. SMITH
GALEN W. BLACK,
and ADAPT,
Respondents.

On Writ of Certiorari to the Supreme Court
of the State of Oregon

BRIEF FOR PETITIONERS

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50 pp

QUESTION PRESENTED

Does the Free Exercise Clause of the first amendment to the United States Constitution protect a person's religiously motivated use of peyote from the reach of a state's general criminal law prohibition?

TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 1

Constitutional Provisions Statutes and Regulations Involved 1

Statement of the Case 2

Summary of Argument 5

Argument

I. Introduction 8

II. The Public Interest in Controlling the Use and Availability of Dangerous Drugs Is Compelling 11

III. Government Cannot Accommodate Religious Use Exemptions from Criminal Laws Regulating Dangerous Drugs 16

Conclusion 36

Appendix App-1

TABLE OF AUTHORITIES

Page

Cases Cited

Braunfeld v. Brown, 366 U.S. 599 (1961) 16,23

Cantwell v. Connecticut, 310 U.S. 296 (1940) 11

Commonwealth v. Nissenbaum, 404 Mass. 575, 536 N.E.2d 592 (1989) 18

Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987) 10

Employment Div., Department of Human Res. v. Smith, ___ U.S. ___, 108 S.Ct. 1444 (1988) 1,4

Epperson v. Arkansas, 393 U.S. 97 (1968) 32

Frazee v. Employment Security Department, ___ U.S. ___, 109 S.Ct. 1514 (1989) 26

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Indian Inmates of Nebraska Penitentiary v. Grammer, 649 F.Supp. 1374 (D. Neb. 1986), *aff'd*, 831 F.2d 301 (1987) 35

Jacobson v. Massachusetts, 197 U.S. 11 (1905) 11-12

Kennedy v. Bureau of Narcotics and Dangerous Drugs, 459 F.2d 415 (9th Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973) 22

Leary v. United States, 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969) . . . . passim

Lemon v. Kurtzman, 403 U.S. 602 (1971) 22

Lyng v. Northwest Indian Cemetery Protective Assoc., 485 U.S. ___, 108 S.Ct. 1319 (1988) 29

Mayock v. Martin, 157 Conn. 56, 245 A.2d 574 (1968), *cert. denied*, 393 U.S. 1111 (1969) 21

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Olsen v. Drug Enforcement Admin., 776 F.2d 267 (11th Cir. 1985), *cert. denied* 475 U.S. 1030 (1986) 19

Olsen v. Drug Enforcement Administration, D.C. Cir. No. 86-1442 10

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Olsen v. State of Iowa, 808 F.2d 652 (8th Cir. 1986) 19,20

Pennhurst State School v. Halderman, 451 U.S. 1 (1981) 10

People v. Mullins, 123 Cal. Rptr. 201, 50 Cal. App.3d 61 (1975) 29

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Peyote Way Church of God, Inc. v. Meese III, 698 F.Supp. 1342 (N.D. Tex. 1988) 19,31

Peyote Way Church of God, Inc. v. Smith, 742 F.2d 193 (5th Cir. 1984) .... passim

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Smith v. Employment Div., 301 Or. 209, 721 P.2d 455 (1986) 3

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State v. Big Sheep, 75 Mont. 219, 243 P. 1067 (1926) 25

State v. Blake, 695 P.2d 336 (Hawaii App. 1985) .... passim

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State v. Olsen, 315 N.W.2d 1 (Iowa, 1982) 19

State v. Randall, 540 S.W.2d 156 (Mo. App. 1976) 20

State v. Rocheleau, 142 Vt. 61, 451 A.2d 1144 (1982) 20

State v. Rocheleau, 451 A.2d 1144, 1149 (1982) 28,29

State v. Soto, 21 Or. App. 794, 537 P.2d 142 (1975), *cert. denied*, 424 U.S. 955 (1976) 25

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Thornton v. Caldor, 472 U.S. 703 (1985) 32-33

Toledo v. Model-Sysco, Inc., 651 F.Supp. 483 (D. N.M. 1986) 34

Town v. State ex rel Reno, 377 So.2d 648 (Flor. 1979) 19

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Page

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Waltz v. Tax Comm'n of the City of New York, 397 U.S. 664 (1970) 32

Warner v. Graham, 845 F.2d 179 (8th Cir. 1988) 35

Whalen v. Roe, 429 U.S. 589 (1977) 12

Whitehorn v. State, 561 P.2d 539 (Okla. Cr. 1977) 25

Whyte v. United States, 471 A.2d 1018 (D.C. App. 1984) .... passim

Wisconsin v. Yoder, 406 U.S. 205 (1972) .... passim

Zorach v. Clauson, 343 U.S. 306 (1952) 32

Constitutional Provisions

U.S. Const. Amend. I 1

Statutory Provisions

Pub. L. No. 89-74 § 3(a), 79 Stat. 226 (1965) 27

21 U.S.C. § 812(b)(1)(A) (1987) 14

21 U.S.C. § 801 *et seq.*(1987) 13

21 U.S.C. § 801-970 (1987) 27

28 U.S.C.S. § 1257(3) (1988) 1

42 U.S.C. § 1996 (1982) 9

9II U.L.A. § 101 *et seq.*(1988) 13

Or. Rev. Stat. § 475.005(6) (1985) .... passim

Page

Statutory Provisions—Continued

Or. Rev. Stat. § 475.015 (former) 15

Or. Rev. Stat. § 475.025 (former) 15

Or. Rev. Stat. § 475.035 (1985) 15

Or. Rev. Stat. § 475.185 (1988) 13

Or. Rev. Stat. § 475.992(4)(a) (1988) 2

Administrative Regulations

21 C.F.R. § 1308.11 (1988) 15

21 C.F.R. § 1308.12 (1988) 15

21 C.F.R. 1307.31 (1988) 9-10

Or. Admin. R. 855-80-020 (1987) 2,14

Or. Admin. R. 855-80-020 - 855-80-026 (1987) 13

Or. Admin. R. 855-80-021 (1987) 2,15

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Or. Admin. R. 855-80-030 - 855-80-105 13

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The Oregon Supreme Court's opinion is reported as *Smith v. Employment Division*, 307 Or. 68, 763 P.2d 146 (1988) (*per curiam*) and is attached to the petition for writ of certiorari as Appendix A. This Court's opinion remanding the cases to the Oregon Supreme Court for further proceedings is reported as *Employment Div., Dept. of Human Res. v. Smith*, ___ U.S. ___, 108 S.Ct. 1444 (1988). It is attached to the petition for writ of certiorari as Appendix B.

JURISDICTION

This Court remanded these consolidated cases to the Oregon Supreme Court by judgment and opinion entered on April 27, 1988. The Oregon Supreme Court heard additional arguments in the cases on September 6, 1988. The Oregon Supreme Court's opinion on remand was dated and filed on October 18, 1988. Jurisdiction to review the Oregon Supreme Court's judgment in this civil case by writ of certiorari is conferred upon this Court by 28 U.S.C.S. § 1257(3) (1988). A petition for writ of certiorari was timely filed, and this Court granted it on March 20, 1989.

CONSTITUTIONAL PROVISIONS STATUTES AND REGULATIONS INVOLVED

The first amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

Or. Rev. Stat. § 475.005(6) (1985) provides in relevant part:

> "Controlled substance" means a drug or its immediate precursor classified in Schedules I through V under the Federal Controlled Substances Act, 21 U.S.C. §§ 811 to 812, as modified under ORS 475.035. . . .

Or. Rev. Stat. § 475.992(4)(a) (1985) provides:

> It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of professional practice, or except as otherwise authorized by ORS 475.005 to 475.285, 475.940 to 475.965 and 475.991 to 476.995. Any person who violates this subsection with respect to:
>
> (a) A controlled substance in Schedule I, is guilty of a Class B felony.

Or. Admin. R. 855-80-020 (1987) provides:

> Pursuant to ORS 475.005(6) as amended by Chapter 666, Oregon Laws 1981, effective August 18, 1981, those drugs and their immediate precursors classified in Schedules I through V under the **Federal Controlled Substances Act, 21 USC Section 811 to 812**, as of August 18, 1981 and as amended by the Board pursuant to ORS 457.035 are the controlled substances for purposes of regulation and control under the Act. Those schedules are set out in rules 855-80-021 through 855-80-026.

Or. Admin. R. 855-80-021 (1987) provides in relevant part:

> Schedule I consists of the drugs and other substances, by whatever official, usual, chemical, or brand name designated, listed in this rule:
>
> . . . .
>
> (3) *Hallucinogenic substances*. . . .
>
> (s) Peyote—Meaning all parts of the plant presently classified as *Lophophorawilliamsii Lemaire*, whether growing or not, the seeds thereof, any extract from any part of such plant, and every compound, manufacture, salts, derivative, mixture, or preparation of such plant, its seeds and extracts.

STATEMENT OF THE CASE

Respondents Alfred Smith and Galen Black were drug and alcohol rehabilitation counselors employed by a private, non-

profit substance abuse treatment organization. Consistent with its treatment philosophy, the employer required its counselors to agree to abstain from alcohol and drugs as a condition of employment. Despite that agreement, respondents used peyote, a Schedule I controlled substance, in a Native American Church ceremony. Their employer fired them.

Smith and Black filed for unemployment benefits. The Employment Division denied their claims on the ground that their ingestion of peyote was misconduct connected with their work. Both Smith and Black are members of the Native American Church, although only Smith is a Native American. Both claimants asserted that because they used the drug for religious reasons, the state and federal constitutions require the state to grant them unemployment benefits despite their disqualification under the compensation scheme. The Employment Division considered and rejected their constitutional arguments.

On review in the Oregon Supreme Court, the state's highest court rejected Smith's and Black's arguments that the Oregon Constitution requires the payment of benefits. *Smith v. Employment Div.*, 301 Or. 209, 216, 721 P.2d 455, 448-49 (1986). The court then considered their federal constitutional claim. Based on its understanding of *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981), the Oregon Supreme Court found that the first amendment's Free Exercise Clause requires the payment of benefits. *Id.*, 301 Or. at 217-20, 721 P.2d at 450-51. The Oregon court did not expressly address peyote's illegal status in Oregon. Nor did it consider whether claimants' ingestion of peyote in a religious ceremony is prohibited in Oregon or, if it is, whether the prohibition is consistent with the United States Constitution.

The Employment Division petitioned this Court for a writ of certiorari. The petition asked the Court to decide whether the federal constitution requires a state to pay unemployment benefits to someone whose religiously motivated misconduct is criminal under state law. This Court granted review. A majority of the Court agreed that "if Oregon does prohibit the religious use of peyote, and if that prohibition is consistent with the Federal Constitution, there is no federal right to engage in that conduct in Oregon. If that is the case, the State is free to withhold unemployment compensation from respondents for engaging in work-related misconduct, despite its religious motivation." 108 S.Ct. at 1451. However, the Court found the Oregon Supreme Court's earlier opinion ambiguous on the legality of the practice under state law. Because that question was potentially dispositive of the case, the Court did not reach claimants' argument that Oregon's criminal prohibition is itself unconstitutional under the Free Exercise Clause. The Court accordingly vacated the Oregon Supreme Court's judgments and remanded the cases for resolution of the state law questions that had surfaced. 108 S.Ct. at 1451-52.

On remand, the Oregon court correctly understood that the cases were returned "for clarification of the legality of petitioners' use of peyote" because this Court "was uncertain whether Oregon law proscribed the peyote use in question here and, if so, whether the law could constitutionally be applied to petitioners." 307 Or. at 72, 763 P.2d at 147. The parties submitted supplemental briefs addressing: (1) whether the Oregon statutory prohibition extends to religious peyote ingestion; (2) assuming arguendo the Oregon court's earlier opinion in Smith's case did not settle the question, whether the Oregon Constitution protects Smith's and Black's conduct; and (3) whether the federal constitution protects religious peyote use from the reach of a state's criminal laws.

The Oregon Supreme Court concluded that the conduct is criminal under Oregon law. *Smith v. Employment Div.*, 307 Or. at 72-73, 763 P.2d at 148. The court therefore reached the federal question and held that the Free Exercise Clause protects good faith religious peyote use by Native American Church members from Oregon's blanket peyote prohibition. *Id.*, 307 Or. at 73-76, 763 P.2d at 148-50.

SUMMARY OF ARGUMENT

The issue for resolution in this case is whether the Free Exercise Clause protects peyote ingestion by Native American Church members from the reach of a state's criminal law prohibition. That issue requires this Court to decide whether, and under what circumstances, individuals who use drugs for sincere religious reasons may invoke constitutional protection for their conduct. Under settled free exercise principles, the first amendment protects religious actions as well as religious beliefs. However, that protection is not absolute. When government has a compelling interest in regulating conduct, religious actions must give way unless government can accommodate the religious practice without compromising its interest.

Without question, government has a compelling interest in regulating the use and availability of dangerous drugs. The problem of drug use and abuse has risen to epidemic proportions in this country. This Court previously has recognized government's regulatory interest in drug control to be vital, and more recently has identified illicit drug trafficking and abuse as one of the most serious domestic health problems facing the nation today. In response to the problem of dangerous drug use, the federal and state governments have enacted controlled substance laws regulating dangerous drugs. These laws represent a coordinated effort across the nation to provide a uniform, comprehensive network of regulations to further the goal of a drug-free society.

Most jurisdictions place narcotics and other dangerous drugs on one of several regulatory schedules, depending on the dangers and benefits of the drug involved. Peyote is a powerful hallucinogen which poses serious and even life-threatening harm when ingested. Because of its dangers and potential for abuse, all jurisdictions regulate peyote intensely. The overwhelming majority of jurisdictions rank peyote among the most dangerous controlled substances and prohibit its use by anyone for any purpose, even under medical supervision. Laws regulating peyote thus reflect with full force government's compelling interest in controlling the use and presence of dangerous drugs.

Government cannot accommodate religious beliefs by exempting religiously motivated drug use from its regulations without seriously compromising its compelling interests. Many religious organizations and many individuls have doctrinal beliefs which call for religious use of hallucinogens and other drugs. To require government to accommodate all religious drug use on the same terms would force government, on a religion-by-religion, drug-by-drug and individual-by-individual basis, to create exemptions from neutral regulations which otherwise apply uniformly to all citizens. That result would have devastating consequences for government's attempts to advance the health, safety and general welfare interests that underlie comprehensive controlled substances laws.

Any regulatory exemption would compromise, first, government's interest in the health and well-being of individual citizens. The dangers of drug use are indifferent to the motivations of the user. There is, accordingly, no reason for government to have less concern for individuals who take drugs for religious reasons than for individuals who take drugs for medicinal, recreational, or other non-religious reasons. Nor is there any way, short of monitoring and intruding into religious ceremonies, to ensure that religious adherents use drugs responsibly in those instances where religious use is claimed to minimize the potential for injury and harm.

Equally important, the overall efficacy of the regulatory scheme would be threatened by ad hoc exemptions for religiously motivated drug use. Laws regulating dangerous drugs would become a patchwork of prohibitions, exempting some people for some drugs and other people for other drugs. That result would cripple law enforcement efforts by making it difficult to distinguish legitimate from illegitimate use and trafficking and by forcing government to disprove easily invoked religious use defenses in criminal prosecutions. It would also permit otherwise prohibited drugs to be in private hands with the result that the drugs and those who possess them easily would become targets for further unlawful activity.

As a result, no legislature or court in the country has concluded that religious drug use can be accommodated consistent with the public's health and safety interests. At most, some authorities have been willing to create a narrow, denomination-specific exemption limited primarily to the Native American Church, restricted sometimes to the church's Native American members, and available only for peyote. All other religious claims for exemptions from controlled substance laws have been legislatively and judicially denied.

The bases on which courts have held that the constitution protects Native American Church peyote use but not the drug use of any other religion are neither tenable nor sound. Other religious adherents have been considered sincere in their beliefs; their use of drugs often is highly important to their religious practices; their religious beliefs sometimes stem from doctrines as old or older than those of the Native American Church; and they have often claimed that their drug use is responsible and minimizes the possibility of injury or harm. However, courts expressly and legislative bodies implicitly have steadfastly refused to accommodate religious drug use on any neutral basis. The exemptions created for peyotism and the Native American Church reflect only a limited willingness to tolerate dangerous drug use on favored terms for what has generally been viewed as a minority religion with a limited following.

The constitution neither condones nor commands accommodation on preferential terms, however. The guarantees of the Free Exercise Clause cannot be expanded or contracted on the basis of race, culture, political sympathy, or unarticulated assumptions that one religion's beliefs in drug use are well founded while other religions' beliefs are not. If religious drug use is protected by the first amendment, it must be protected on the basis of neutral principles that apply equally to all religious doctrines and to all religious believers. However, as courts have uniformly recognized, requiring government to exempt all bona fide religious drug use from otherwise valid and neutral controlled substance laws is inconsistent with the public's compelling interests. Accordingly, for the same reasons that religious use exemptions have been denied to all other religions for the use of all other drugs, claimants' assertion of constitutional protection for their religious peyote ingestion must be rejected here.

ARGUMENT

I. Introduction.

This case began as an unemployment benefits case and ultimately it will end as one. Central to the resolution of the benefits issue, however, is the question whether claimants' work-related misconduct (the ingestion of a Schedule I drug) is criminal and legally unprotected. After being refined in six appellate court decisions, the case now presents the straightforward question whether Oregon's criminal law prohibiting peyote possession is unconstitutional as applied to Native

American Church members who ingest peyote for religious reasons. To answer that question, the Court must decide whether, and under what circumstances, the Free Exercise Clause protects religious drug use from the reach of generally applicable and religiously neutral drug regulations.

The Oregon Supreme Court's resolution of that question does not provide even an acceptable starting point. The state court rested its holding on its view that Congress has determined Native American Church peyote use is constitutionally protected. To support its assessment of Congress' understanding, the state court looked to the legislative history surrounding Congress' failure to enact a proposed exemption for Native American Church peyote use as part of the federal Controlled Substances Act. In the legislative debates, a few members of Congress expressed their opinions that the first amendment protects this one denomination's religious drug use. Those legislators therefore believed that the regulatory agency which administers the law would not be able to enforce the peyote prohibition against Native American Church members.[1] The regulatory agency thereafter created an exemption by administrative rule as an apparent concession to the agency's perception of congressional will.[2] *See* 21 C.F.R.

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[1] The state court pointed to one representative's statements made in 1965 when the House adopted uniform laws regulating dangerous drugs, including peyote. Citing a 1964 California Supreme Court decision (*People v. Woody*, 61 Cal.2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964)), that congressional member assured the House that the Food and Drug Administration would not be able to forbid Native American religious peyote ingestion consistent with the federal Free Exercise Clause. The state court also pointed to a legislative committee report that accompanied the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1982), in which the committee viewed it as "established federal law" that the constitution protects Native American religious peyote ingestion. *Employment Div. v. Smith*, 307 Or. at 74-75, 763 P.2d at 149.

[2] As the petition for writ of certiorari discusses (pp 11-12 and fn. 5), the federal government has taken the position that the federal agency lacked authority to create the exemption. The federal government also asserts that,

(Footnote continued on next page)

1307.31 (1988).

The Oregon Supreme Court did not independently assess what the first amendment requires. The lower court instead deferred to Congress as the final arbiter of the meaning of the first amendment, although unquestionably that is not Congress' role. *Cf. Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (testing congressional decision to exempt religious institutions from Title VII's religious discrimination provisions).

Even if congressional understanding were viewed as possibly informative on the Free Exercise Clause's meaning, the "legislative history" cited by the Oregon Supreme Court is legislative history at its weakest. It represents the isolated opinions of no more than a few congressional members. They based their opinions on a small number of lower court decisions resolving a question which this Court had never addressed and on which lower courts have divided. Finally, the history arises from congressional inaction rather than any accountable, affirmative policy choice.[3]

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contrary to the understanding of those congressional members who expressed their opinions on the question, the federal Free Exercise Clause does not require government to exempt religious peyote or other drug use from the federal Controlled Substances Act. *See* Respondent-Appellee's Br., *Olsen v. Drug Enforcement Administration*, D.C. Cir. No. 86-1442; *Olsen v. Lawn*, D.C. Cir. No. 86-0236 (consolidated; under advisement).

[3] The Oregon Supreme Court also referred to congressional power under section 5 of the fourteenth amendment to protect against state infringement of what Congress believes to be the free exercise of religion under the first amendment. 307 Or. at 75, 763 P.2d at 149. The state court then acknowledged that Congress had not acted on that power expressly. *Id.* The court's point about Congress' section 5 authority is less than clear. However, to the degree it thought that Congress exercised its section 5 power effectively under these circumstances, the state court unquestionably was wrong. *See, e.g., Pennhurst State School v. Halderman*, 451 U.S. 1, 16-17 (1981) (Congress must communicate its intent to act on its section 5 power in express and unequivocal terms).

The Oregon Supreme Court's approach effectively abdicates judicial responsibility to resolve the first amendment question presented. The issue must be considered with reference to the principles and values that inhere in the federal constitution's guarantee of religious freedom. The analysis must account for the significant personal and governmental interests at stake. When the issue is properly approached, the conclusion must be that religious drug use, including Native American Church peyote ingestion, is not constitutionally protected.

II. The Public Interest in Controlling the Use and Availability of Dangerous Drugs Is Compelling.

The starting point for the analysis is the settled principle that while the constitution broadly protects religious beliefs and opinions, religious conduct must give way to regulations that serve public interests of compelling importance. *Cantwell v. Connecticut*, 310 U.S. 296, 308-04 (1940). The health and welfare of citizens, the safety of our communities, and the stability of our society are among the most important goals served by government's regulatory efforts; laws that serve those interests are, for constitutional purposes, "compelling." *Sherbert v. Verner*, 374 U.S. at 403 (government may regulate religious conduct that poses "some substantial threat to public safety, peace or order"). *See also, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972) ("activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety and general welfare . . ."). Regulatory authority, therefore, has survived free exercise challenges in such diverse but traditional health and welfare areas as child labor, *Prince v. Massachusetts*, 321 U.S. 158 (1944), polygamy, *Reynolds v. United States*, 98 U.S. 145 (1878), disease control, *Jacobson v. Massachusetts*, 197 U.S. 11

(1905) (small pox vaccinations) and mandatory social welfare programs, *United States v. Lee*, 455 U.S. 252 (1982) (social security tax).

The challenge here is to government's regulatory authority over dangerous drugs. Throughout this case, there has been no real dispute that government has a "compelling" interest in laws that control the use and availability of dangerous drugs. Nor has there been any serious debate that laws regulating peyote trigger this compelling public interest with full force. The key disagreement has been whether religious use exemptions from the law, or at least exemptions for Native American Church use of peyote, compromise that interest. Nevertheless, the problem and proportions of drug use in this country, and the dangers of peyote ingestion, merit description in order to cast the issue in full light.

More than ten years ago, this Court characterized government's interest in controlling the possession and use of dangerous drugs as "vital." *Whalen v. Roe*, 429 U.S. 589, 598 (1977). More recently, the Court has identified drug abuse as "one of the greatest problems affecting the health and welfare of our population" and thus "one of the most serious problems confronting society today," *National Treasury Emp. Union v. Von Raab*, ___ U.S. ___, 109 S.Ct. 1384, 1392, 1395 (1989). Those characterizations are not exaggerations. Few problems confronting society today are as devastating in their consequences, as unmanageable in their proportions, and as immediate in their danger as that of drug use and abuse. The nation's drug crisis pervades every facet of our citizens' lives. It is present in our cities, our streets, our work places, our schools and our homes. Illicit drug use also crosses all social boundaries: age, economic class, gender, profession, national origin, religious and political affiliation, geographic location. The federal and state governments, together with the local authorities, are engaged in a battle against dangerous

drugs that in real terms, not just euphemistically, is a "war." *Cf. National Treasury Emp. Union v. Von Raab*, 109 S.Ct. at 1392 (describing the Customs Service as the nation's "first line of defense" in a drug problem that has become a veritable crisis in law enforcement).

Even before the drug crisis escalated to its present proportions, states and the federal government undertook comprehensively to regulate drugs deemed dangerous to the public. As in many jurisdictions, Oregon's present laws are modeled after the Uniform Controlled Substances Act. Unif. Controlled Substances Act, 9II U.L.A. §§ 101 *et seq.*(1988). That Uniform Act, in turn, was drawn from and designed to complement the 1970 federal Controlled Substances Act, 21 U.S.C. §§ 801 *et seq.* (1987). *Id.*, Prefatory Note, pp. 2-3. Following the federal scheme, regulated drugs in Oregon are placed on one of five schedules, depending on the dangers and benefits of the drugs involved.[4] Drugs on the lower schedules are available to some people for some purposes, subject to various regulatory contraints designed to ensure that they are used appropriately (*i.e.*, prescribed by licensed physicians and dispensed by licensed pharmacists).[5] As the hazards of a drug's availability and use increase, the regulatory restrictions increase. Schedule I, the most stringently controlled listing, consists of the most dangerous drugs known in society. The use and availability of Schedule I drugs is deemed sufficiently hazardous to health and public order that these drugs cannot be used by anyone for any purpose, even under medical supervision.[6]

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[4] *See generally*, Or. Rev. Stat. § 475.005(6) (1985); Or. Admin. R. 855-80-020 through 855-80-026 (1987).

[5] For example, substances in Schedule II may be prescribed and dispensed by a pharmacy, but the prescription must be written and cannot be refilled. Substances on lower schedules (III, IV, V) can be refilled orally or in writing. Or. Rev. Stat. § 475.185 (1988). By administrative rule (Or. Admin. R. 855-80-030 through 855-80-105), Oregon has established exhaustive licensing, record-keeping and inventory procedures to monitor the flow of controlled substances through these legitimate channels.

Peyote (*Lophophora williamsii*), a Schedule I drug in Oregon, is a powerful and dangerous hallucinogen derived from a species of cactus which grows in the southwestern United States and in Mexico.[7] When ingested in a quantity sufficient to produce a psychotropic effect, the drug alters certain basic physiological functions and the way in which the user sees and perceives reality. In high doses, the drug can permanently damage health and be life-threatening.[8] *See generally, Peyote Way Church of God, Inc. v. Smith*, 742 F.2d 193, 197 (5th Cir. 1984) (reciting in general terms effects of peyote ingestion), *People v. Woody*, 61 Cal.2d 716, 394 P.2d 813, 816-17, 40 Cal. Rptr. 69 (1964) (same).

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[6] Oregon incorporates the federal scheme for scheduling controlled substances. Or. Rev. Stat. § 475.005(6) (1985); Or. Admin. R. 855-80-020 (1987). Under the federal act, a Schedule I substance is one that has been determined to have a high potential for abuse, no currently accepted medical use in the United States, and a lack of accepted safety for use of the drug, even under medical supervision. 21 U.S.C. § 812(b)(1)(A) (1987).

[7] R. JULIEN, A PRIMER OF DRUG ACTION (3d Ed 1981) 148.

[8] The ingestion of peyote in a quantity sufficient to produce a hallucinogenic effect poses severe risks to human health and well-being. Peyote's major active ingredient is mescaline. Low doses of mescaline produce "dilation of the pupils, increased blood pressure and heart rate, an increase in body temperature, EEG and behavioral arousal, and other excitatory symptoms" similar to those produced by amphetamines. R. JULIEN, A PRIMER OF DRUG ACTION (3d Ed 1981) 148-49. Mescaline also produces vivid hallucinations, usually both visual and auditory, and can cause temporary psychosis. *Ibid*; W. LA BARRE, THE PEYOTE CULT (1969 Ed.) at 141-42; Giannini, Price & Giannini, *Contemporary Drugs of Abuse*, 33 AM. FAMILY PHYSICIAN, March, 1986, at 207-08. High doses lead to "severe hypertension, a toxic acute brain syndrome (manifested by disorientation), a clouding of consciousness, and convulsions," as well as death or respiratory failure probably caused by "vasospasm of isolated cerebral arteries." Altura & Altura, *Phencyclidine, Lysergic Acid Diethylamide, and Mescaline: Cerebral Artery Spasms and Hallucinogenic Activity*, 212 SCIENCE, May 29, 1981, at 1051. *See also* Reynolds & Jindrich, *A Mescaline Associated Fatality*, 9 J. OF ANALYTICAL TOXICOLOGY, July/August, 1985, at 183.

By classifying peyote as a Schedule I substance, the Oregon legislature has determined peyote to be at the top of the list of dangerous drugs and narcotics.[9] That legislative judgment is not unique or exceptional. The federal government similarly lists peyote on Schedule I, as do most other states.[10] In Oregon, peyote ranks in the same class as LSD, heroin and mescaline (Schedule I substances) and is deemed more dangerous than drugs such as morphine, cocaine and methemphetamine (Schedule II substances).[11]

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[9] The Oregon legislature has adopted the federal schedules subject to amendment and modification as the state deems appropriate. Or. Rev. Stat. § 475.005(6) (1985). The legislature has delegated the responsibility for reviewing the schedules and modifying the lists of drugs on them to the state Board of Pharmacy. Or. Rev. Stat. § 475.035 (1985).

Whether peyote belongs on Schedule I or some less restrictive schedule has been actively debated. Prior to 1981, the state legislature had created a "Committee on Controlled Substances" with authority to "add, reclassify or delete" any drug from the federal listing incorporated into the state scheme. The state Board of Pharmacy was required to accept the committee's reclassification. Former Or. Rev. Stat. §§ 475.025, 475.015. In 1980, the committee proposed to reschedule several drugs, including hallucinogens. Drugs such as peyote, LSD, mescaline and heroin would have been removed from Schedule I and placed on Schedule III. Members of the legislature and community believed the proposed change was irresponsible. *See* S.B. 543, Exh. E, Senate Committee on Justice, Hearing of April 7, 1981. As a result, the legislature abolished the committee and transferred the scheduling authority to the Board of Pharmacy. (S.B. 543, 61st Leg. Sess. (Reg.), 1981 Or. Laws 666). Peyote has remained on Schedule I since that time.

[10] As an appendix to this brief, we have prepared a table citing the relevant statutes regulating peyote for the 50 states and the District of Columbia. When the federal scheme is also counted, a minimum of 44 jurisdictions place peyote on their most stringent regulatory schedule. Four states (Alaska, Maine, Minnesota, Texas) place peyote on their second or third regulatory schedule. One state, Vermont, has not adopted a scheme based on the Uniform Act. Although Vermont's statutes prohibit peyote, the drug is not on any comparative schedule. Finally, although Arkansas, Nevada and New Hampshire have adopted uniform controlled substances schemes, the schedules are established by administrative rule. We were unable to obtain other states' administrative rules to confirm that peyote is on Schedule I.

[11] *See* Or. Admin. R. 855-80-021 (1987) (Schedule I) and Or. Admin. R. 855-80-022 (1987) (Schedule II). *See also* 21 C.F.R. § 1308.11 (1988) (federal Schedule I) and 21 C.F.R. § 1308.12 (1988) (federal Schedule II).

The importance of comprehensive drug regulation to the states and the nation must not be understated. The point that this vital public interest extends with full force to laws regulating peyote must not be overlooked. Every jurisdiction in the United States regulates dangerous drugs, including peyote. No court in any jurisdiction or other authority suggests that use of dangerous substances, including hallucinogens such as peyote, is not within the regulatory reach of the state and federal governments. Although other domestic health, public safety and welfare concerns may match drug use in significance (*e.g.*, the AIDS epidemic), few, if any, exceed it. Government's interest in effective and comprehensive drug control, including control over peyote, is truly compelling in its importance.

III. Government Cannot Accommodate Religious Use Exemptions from Criminal Laws Regulating Dangerous Drugs.

The inquiry does not necessarily end with the recognition that government has a compelling interest in controlling dangerous drug use. The question remains whether government can "accommodate" religious drug use by exempting it from the reach of the criminal prohibition. If government can allow a religion-based exemption without compromising its interest, the Free Exercise Clause requires it to do so. *United States v. Lee*, 455 U.S. at 259; *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961).

In actual practice, this Court has found no room for "accommodating" religion-by-religion exemptions from neutral laws of general applicability when those laws directly serve health, safety or public order interests. *Cf. Wisconsin v. Yoder*, 406 U.S. at 230 (exempting Amish from mandatory schooling after eighth grade, and distinguishing laws that proscribe acts which threaten health and safety). The decisions recognize that regulations of that kind depend on uniformity and comprehensiveness to be effective. Thus, for example, there may be some "exceptional" polygamists who conceivably could engage in multiple marriages without disturbing the social order. The constitution, however, does not require government to exempt them from laws making polygamy criminal. *Reynolds v. United States*, 98 U.S. at 166. Similarly, although certain precautions may be taken by adults to avoid the hazards of child labor, the government constitutionally may eliminate all risk of harm through an absolute prohibition. *Prince v. Massachusetts*, 321 U.S. at 169-70. And when a regulatory scheme would become difficult to administer and diluted in effectiveness by "myriad exceptions flowing from a wide variety of religious beliefs," government is not constitutionally obligated to grant exemptions based on religious beliefs. *United States v. Lee*, 455 U.S. at 260. Government must be able to regulate the conduct of all citizens if it is to serve effectively the society's common needs. "The very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has a common interest." *Wisconsin v. Yoder*, 406 U.S. at 215-16.[12]

A second, equally significant concern flows through the decisions. This Court has recognized that granting religion-by-religion exemptions from facially neutral laws raises the potential for government to discriminate among religions and to suggest preference for some sects over others. A fundamental Establishment Clause principle holds that government cannot abandon secular purposes in order to put "an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization," *United States v. Gillette*, 401 U.S. 437, 450 (1971). That principle is difficult to reconcile with a government-sanctioned exemption which permits religious adherents only to escape the reach of a neutral law of general applicability. The prospect, for example, that "those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do must be acquitted and go free" certainly suggests Establishment Clause problems, as the Court intimated in *Reynolds v. United States*. 98 U.S. at 166. Similarly, the danger of an erratic and even discriminatory process of exemption has led the Court to refuse to create individual-by-individual exemptions to the draft based on specific religious beliefs, rather than on a general, non-sectarian "conscientious objector" standard. *United States v. Gillette*, 401 U.S. 437.

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[12] The Court made the same point in *Reynolds v. United States*. To permit individuals for religious reasons to violate laws that serve the common good "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist in name only under such circumstances." 98 U.S. at 166-67.

As a constitutional matter, any protection extended to Smith and Black for their religious peyote use should honor not only their claim to religious freedom, but it should honor all others on like terms. Government cannot, however, "accommodate" their religious drug use without disserving its interest in religious neutrality and its compelling interest in comprehensive drug control.

Religiously motivated drug use is not a phenomenon unique to one church, one religious belief system, or one narrow group of religious adherents. Hallucinogenic drugs have religious significance in several cultures. Some of these religions have deep roots. *See, e.g., People v. Woody*, 394 P.2d at 817, (religious use of peyote traceable to several-hundred-year-old traditions of Spanish and Mexican cultures); *United States v. Kuch*, 288 F.Supp. 439, 444 (D. D.C. 1968) (referencing 2,000-year-old "sacred mushroom" religious ceremony of the Mexican culture); *Commonwealth v. Nissenbaum*, 404 Mass. 575, 536 N.E.2d 592 (1989) (discussing marijuana use in

church with sixty-year history as a formal organization, and with doctrinal beliefs dating back as many as 6,000 years). Others may have been borne of more contemporary revelation. *See, e.g., Leary v. United States*, 383 F.2d 851, 857-59 (5th Cir. 1967). Without question, however, the number of organizations and individuals proclaiming religious motivations for drug use is far from small.

Reported appellate cases from across the country provide a sampling that reveals both the range of these religious claims and the persistence of those who assert them.[13] Like members of the Native American Church, Peyote Way Church members have claimed a free exercise right to peyote for religious reasons.[14] The Native American Church of New

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[13] Whatever the merits of his claim, Carl Eric Olsen has pursued an exemption for religious marijuana use with considerable resolve and fervor. Members of the Zion Coptic Church, to which Olsen subscribes, first unsuccessfully pressed for an exemption for religious marijuana use in the State of Florida. *Town v. State ex rel Reno*, 377 So.2d 648 (Flor. 1979). Later, in 1982, Mr. Olsen was convicted of a criminal offense in the State of Iowa in connection with marijuana use and possession. The state's highest court rejected his free exercise claim. *State v. Olsen*, 315 N.W.2d 1 (Iowa, 1982). He then sought federal habeas corpus relief, again on freedom of religion grounds. He again lost. *Olsen v. State of Iowa*, 808 F.2d 652 (8th Cir. 1986). Olsen simultaneously pursued administrative remedies before the federal Drug Enforcement Administration ("DEA") by petitioning for a religious exemption similar to that administratively granted to the Native American Church. The Administrator declined to act on his petition. Olsen unsuccessfully sued in federal district court in an effort to compel the Administrator to act. He then appealed to circuit court. The circuit court agreed that the Administrator was obligated to act, but it held that Olsen's petition was defective. *Olsen v. Drug Enforcement Admin.*, 776 F.2d 267 (11th Cir. 1985), *cert. denied* 475 U.S. 1030 (1986). Olsen later filed a new petition, and the Administrator acted on it and denied his request for regulatory exemption. Mr. Olsen's appeal of that administrative decision is now pending in the United States Court of Appeals for the District of Columbia, (C.A. No. 86-1442), some ten years after the church first failed in its attempt to secure constitutional protection for its religious drug use.

[14] *Peyote Way Church of God, Inc. v. Smith*, 742 F.2d 193 (5th Cir. 1984); *Peyote Way Church of God, Inc. v. Meese III*, 698 F.Supp. 1342 (N.D. Tex. 1988). *See also In re Grady*, 61 Cal.2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964) (self-styled "peyote preacher" and "way shower" claimed religious right to use peyote).

York has judicially pursued religious exemptions for several psychedelic drugs.[15] Members of the Aquarian Brotherhood Church have claimed a free exercise right to use marijuana, LSD and hashish for religious purposes.[16] Moslems have asserted a free exercise entitlement to use and possess heroin and marijuana.[17] The Ethiopian Zion Coptic Church, Hindus, Hindu Tantrists, the Twelve Tribes of Israel (Rastafarians), Tantric Buddhists and others have sought constitutional exemptions from laws prohibiting marijuana use.[18] In addition, individuals without any particular church or organizational affiliation also sought constitutional protection for their religious use of otherwise unlawful drugs.[19]

This list is far from exhaustive. But it accurately illustrates the diversity and volume of claims for religious drug use protection that have confronted both state and federal courts. It also realistically demonstrates that if the Free Exercise Clause protects religiously motivated drug use from the reach of comprehensive drug control schemes, government must attempt to craft religion-by-religion, drug-by-drug, and

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[15] *Native American Church of New York v. United States*, 468 F.Supp. 1247, 1248 (S.D. N.Y. 1979), *aff'd mem.*, 633 F.2d 205 (2d Cir. 1980).

[16] *State v. Randall*, 540 S.W.2d 156 (Mo. App. 1976).

[17] *United States v. Hudson*, 431 F.2d 468 (5th Cir. 1970), *cert. denied*, 400 U.S. 1011 (1971).

[18] *Olsen v. State of Iowa*, 808 F.2d 652 (8th Cir. 1986); *United States v. Rush* 738 F.2d 497, 511-13 (1st Cir. 1984) *cert. denied*, 470 U.S. 1004 (1985); *United States v. Middleton*, 690 F.2d 820 (11th Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983); *State v. Blake*, 695 P.2d 336 (Hawaii App. 1985); *Wahid v. State*, 716 P.2d 678 (Okla. Ct.) *cert. denied*, 106 S.Ct. 2899 (1986); *Whyte v. United States*, 471 A.2d 1018 (D.C. App. 1984); *State v. Rocheleau*, 142 Vt. 61, 451 A.2d 1144 (1982); *Leary v. United States*, 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969); *State v. Brashear*, 92 N.M. 622, 593 P.2d 63 (1979).

[19] *See, e.g., State v. Blake*, 695 P.2d at 339-40; *State v. Brashear*, 593 P.2d at 68; *Leary v. United States*, 383 F.2d at 859-62.

individual-by-individual exemptions from those laws. That result would wreak havoc with government's efforts to control dangerous drug use in this country.

"Accommodating" religious drug use necessarily would mean that highly dangerous drugs (commonly Schedule I hallucinogens[20]) could lawfully be in private hands, for use at private discretion. Each exemption therefore would compromise the regulatory goal of eliminating the presence, use and availability of dangerous drugs in our society. That compromise would bring with it the hazards of personal drug use, both for the user and for those who come into contact with the user. Activities which are not safe cannot be made safe by having a religious reason for participating in them.[21] Whether hallucinogens are taken in a religious ceremony, as medicine, in a quest for secular personal enlightenment or for recreation, a user's objective is to alter his or her physical state in order to alter consciousness. These drugs are regulated as Schedule I drugs precisely because the physiological changes they induce are highly dangerous to personal health. Those dangers are indifferent to a user's motivation for using the drug. Simply stated, when conduct jeopardizes human health and safety, government cannot deregulate for religion without sacrificing its health and safety interests in the regulation. *See Kennedy v. Bureau of Narcotics and Dangerous Drugs*, 459 F.2d 415 (9th Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973) (government's interest in prohibiting peyote use in order to protect the health of its citizens is not less or different when those citizens have certain religious beliefs).

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[20] With the exception of marijuana, which is sometimes on lower schedules, all of the drugs for which religious exemptions have been sought are Schedule I hallucinogens in nearly all jurisdictions. The dangers of the drugs appear to correlate closely with the effect that gives rise to a drug's religious significance to some users.

[21] Some concededly extreme examples underscore this point. For instance, handling poisonous snakes and drinking poison is no less a threat to the state's health and safety interests when religiously motivated than when done on a dare. *Cf. State ex rel. Swann v. Peck*, 527 S.W.2d 99 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976) (enjoining such religions practices). The same is true of religiously motivated disfigurement: government's welfare interests are no less at stake when a person removes his eye and hand for religious rather than for secular reasons. *Cf. Mayock v. Martin*, 157 Conn. 56, 245 A.2d 574 (1968), *cert. denied*, 393 U.S. 1111 (1969) (mental commitment of man who engaged in self-mutilation for religious reasons).

Nor is it a satisfactory answer that religious peyote ingestion somehow minimizes the potential for the drug to cause harm. Of course, any claim of safe religious peyote use is contradicted by the legislative judgment inherent in Oregon's criminal law prohibition, by the stringent scheduling of peyote throughout the country, and by what is generally known about the serious health dangers of the drug. Even assuming, however, that peyote can be taken safely and with predictability, there is no acceptable way for government to know that it will be.[22] The only way to test possible assertions about responsible peyote ingestion and to provide accountability for the drug's use is for government to monitor the ceremony itself. The prospect of government so intruding on the inner sanctity of religious ceremonies presents obvious practical difficulties and strikes in a particularly troubling way at the core Establishment Clause value of keeping government out of the business of overseeing religious doctrine and practices. *See generally Lemon v. Kurtzman*, 403 U.S. 602 (1971).

As previously discussed, however, this Court has not been willing to exempt religious conduct from important health and

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[22] *Cf. Peyote Way Church of God, Inc. v. Smith*, 742 F.2d at 196 (church members candidly acknowledged that small quantities of peyote are distributed to non-members, to alcoholics seeking treatment, and to persons determining their interest in church membership).

safety regulations, even based on promises that the harm inherent in the conduct will be minimized. *E.g.*, *Reynolds v. United States*, 98 U.S. at 166 (polygamy); *Prince v. Massachusetts*, 321 U.S. at 169-70 (child labor). The point of those holdings is that when conduct poses grave health hazards, whether or not it causes injury in any particular instance, government must be able to avoid the risk of harm as well as the harm itself, if the public's interests are to be adequately served.

Beyond the health and well-being of individual drug users, however, government's interests extend also to the efficacy of the entire scheme regulating dangerous drugs. To require government to accommodate ad hoc religious use exemptions would weaken the entire fabric of the nation's controlled substances laws. Our country is, as the Court has observed, a "cosmopolitan nation made up of people of almost every conceivable religious preference." *Braunfeld v. Brown*, 366 U.S. at 606. The drug laws adopted by the states and the federal government depend on uniformity and comprehensiveness to be effective.[23] Just as a comprehensive tax system would be administratively unmanageable and ineffective if government must accommodate "myriad exemptions flowing from a wide variety of religious beliefs," *United States v. Lee*, 455 U.S. at 259-60, the drug laws too could not fully serve the compelling interests that underlie them. Every religious drug use exemption would compromise the public goal of achieving a society that is drug free. Every exemption would complicate government's law enforcement task of distinguishing legitimate from illegitimate possession, use and trafficking. Every time an individual citizen is in a position lawfully to possess drugs that others desire but cannot have, both that citizen and society are threatened with additional crime. *See generally National Treasury Emp. Union v. Von Raab*, ___ U.S. ___, 109 S.Ct. 1384, 1392-93 (1989) (detailing criminal activities that target those who come into legitimate contact with illicit narcotics).[24] Moreover, every criminal defendant who seeks false refuge in the Free Exercise Clause would shift a heavy, perhaps insurmountable burden on the government to disprove a free exercise defense in prosecuting drug law violations.

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[23] The prefatory note to the Uniform Controlled Substances Act emphasize the importance of uniformity and coordination among the state and federal governments in drug regulatory efforts. The Uniform Act was designed to complement federal laws by providing "an interlocking trellis of Federal and State law to enable government at all levels to control more effectively the drug abuse problem." As the prefatory remarks discuss, much illicit drug use and trafficking is attributable to the diversion of drugs from legitimate sources and channels. Controlling the distribution and diversion of drugs across state lines, given the increased mobility of citizens in this nation, renders it critical to have comprehensive and coordinated regulatory efforts at national, state and local levels. *Id.* at pp. 2-3.

Courts and legislatures alike have uniformly recognized that a neutral rule granting drug use exemptions to all religions on the same terms would spell disaster for comprehensive drug regulations. No legislative body or regulatory agency in the country has created an exemption for all sincere drug use in the course of religious worship. No state or federal court has determined that government's compelling interest in drug control would be less than harshly compromised if all sincere religious drug use were exempted from the reach of the law. Implicit in the lack of any general religious use exemption in state and federal controlled substances acts, and

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[24] The record in this case in fact suggests potential for those who possess drugs for religious purposes to become attractive targets for other criminal activity. Mr. Stanley Smart, the Road Chief who conducted the religious ceremonies in which Smith and Black participated, often supplies peyote for as many as four ceremonies a week. He lives in Nevada, but travels to Oregon and other states to conduct ceremonies. (Smith Rec., Exh. 7, Aff. of Stanley Smart, p. 1 and Aff. of Omer Stewart, P. 2). At any given time, because peyote must be transported from southern states or Mexico, it appears that Mr. Smart possesses considerable quantities of the drug. Given the level and severity of criminal activity that surrounds illicit drugs wherever they are found, Mr. Smart is often in considerable danger, whether or not he has actually been the victim of any crime.

express in the lower court decisions,[25] is the recognition that government cannot "accommodate" all sincere religious drug use without serious damage to the public's broader interests.

Granted, some courts and some legislative bodies have "accommodated" religious drug use in a limited way. But they have done so only by creating what is largely a denomination-specific exemption, available only to the adherents of one set of religious beliefs (the Native American Church and sometimes related churches), for the use of one drug (peyote).[26] The apparent theory underlying a narrowly drawn

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[25] *See, e.g., United States. v. Middleton*, 690 F.2d at 825 (logically, first amendment must protect all drugs and all religions that use them if it protects one; government regulatory efforts would be defeated by that result); *Whyte v. United States*, 471 A.2d at 1020-21 (compelling government interest evidenced by comprehensive drug regulation scheme with wide-ranging goals would be unduly compromised by religious use exemptions).

[26] State courts in California and Arizona have held that the federal Free Exercise Clause protects Native American Church peyote use. *People v. Woody*, 61 Cal.2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); *State v. Whittingham*, 19 Ariz. App. 27, 504 P.2d 950 (1973). *Contra State v. Soto*, 21 Or. App. 794, 537 P.2d 142 (1975), *cert. denied*, 424 U.S. 955 (1976); *State v. Bullard*, 267 N.C. 599, 148 S.E.2d 565 (1966), *cert. denied*, 386 U.S. 917 (1967); *State v. Big Sheep*, 75 Mont. 219, 243 P. 1067 (1926). An Oklahoma decision, *Whitehorn v. State*, 561 P.2d 539 (Okla. Cr. 1977), has found a limited first amendment right for Native American Church members to "carry" sacred and often inherited peyote buttons. That case does not hold, however, that the peyote may be ingested.

The federal regulatory exemption for Native American Church peyote use is a codification of the holding in *Woody*. *See generally Smith v. Employment Div.*, 307 Or. at 74-75, 763 P.2d at 149 (discussing legislative history underlying the federal exemption). Eleven states also have statutory provisions expressly exempting religious peyote use. The state exemptions are cited in the table appended to this brief. Arizona undoubtedly created an exemption in response to the holding in *Whittingham*. The remaining ten states appear to have modeled their exemptions after the federal exemption. All of the exemptions are limited in scope. Six states (Iowa, Kansas, Minnesota, South Dakota, Wisconsin, Wyoming) restrict the exemption to the Native American Church. Texas further narrows the exemption by extending it only to those members of the Native American Church with at least 25 percent Native American blood. Colorado, New Mexico and Nevada, perhaps concerned with the legality of a denomination-specific exemption, broaden the exemption slightly to encompass peyote use by any

(Footnote continued on next page)

exemption is that the interference with comprehensive drug regulations is "de minimis" if only a small number of people may invoke the constitution's protections. The desire of lower courts to find some means to accommodate Native American Church members' peyote use may be understandable. As a matter of constitutional jurisprudence, however, these denomination-specific exemptions are neither tenable nor sound.

The most widely cited and discussed lower court case is the 25-year-old California Supreme Court decision in *People v. Woody*, 61 Cal.2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964). The California court detailed at some length the dangers of peyote use, the history of the Native American Church, the central nature of its belief in peyote ingestion, and the carefully ritualized ceremony through which peyote is ingested. *Id.*, 394 P.2d at 817-18. In considering the Free Exercise Clause claim, the court independently evaluated the health dangers of peyote ingestion and concluded they were minimized in Native American ceremonies. *Id.*, 384 P.2d at 818. The court also rejected as "untested assertions" the state government's claims that its law enforcement efforts would be frustrated. *Id.*, 394 P.2d at 819. In the court's view, peyote use was the *sine qua non* of the Native American Church faith, more essential to the group's religious practice than was polygamy to the Mormon believers prosecuted in *Reynolds v. United States*, 98 U.S. 145 (1878). The court therefore held that the Free Exercise Clause protects Native American Church members from the reach of the state's criminal laws. *Id.*, 394 P.2d at 820-21.

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bona fide religious organization. Apparently, in those states, a sincere peyotist who declines to join or is refused membership in an organized church is denied protection even though the constitution does not permit free exercise lines to be drawn on that basis. *Frazee v. Employment Security Dept.*, __ U.S. __, 109 S.Ct. 1514, 1517-18 (1989).

Unquestionably, the California court intended only to create a narrow exception for a small and distinct religion of limited popularity, one whose religious practices were removed and isolated from the rest of society. By its own acknowledgment, it was carving out of the drug laws "an exception for a few believers in a strange faith," one that would require accommodating the beliefs of only "a minority of Indians." *Id.*, 394 P.2d at 821. The government's law enforcement interests, in the balance struck by the California court, simply did not weigh as heavily as the rights of Native Americans "who honestly practiced an old religion in using peyote one night at a meeting in a desert hogan." *Id.*, 394 P.2d at 821.

A quarter of a century has since passed. Significant numbers of an entire generation of our citizens have experimented with hallucinogens and other drugs. The attraction of dangerous drugs has proven extraordinarily difficult to combat as drug use and abuse have climbed to epidemic proportions. The federal government, since *Woody*, has stepped in with comprehensive drug laws regulating all hallucinogenic drugs, including peyote.[27] The states have followed suit, generally modeling their drug laws after the Uniform Act designed to complement the federal 1970 Controlled Substances Act. Comprehensive drug control efforts have become a national agenda on a scale unknown and perhaps unforeseen at the time *Woody* was decided.

The 1970's and 1980's brought with them an unprecedented number of claims for religious exemptions from those uniform regulatory enactments. Judges have sometimes struggled with the analysis, unsure of their ability to quantify the weight of a citizen's theological interests or a legislature's assessment of society's needs as a whole, and then to gauge how the scales balance. *E.g.*, *United States v. Kuch*, 288 F.Supp. 439, 446 (D. D.C. 1968) ("No United States District Judge who must act within the confines of a record and available judicial time has the wisdom or means of doing adequately what the cases appear to require."). Only one consistent theme has emerged from the case law: if you are a Native American member of the Native American Church, your sincere religious peyote use may be constitutionally protected. If you hold any other set of religious beliefs, use any other prohibited drug, and perhaps if you are any other race, you receive no first amendment protection for your religious drug use.

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[27] Drug Abuse Control Act Amendments of 1965, Pub. L. No. 89-74 § 3(a), 79 Stat. 226 (1965); 1970 Controlled Substances Act, 21 U.S.C. §§ 801-970 (1987).

Not surprisingly, given the context, some claims for a religious exemption from drug laws have appeared less than legitimate.[28] But for the most part, courts have accepted the sincerity of the beliefs asserted either on the basis of credible showings or the absence of anything to suggest lack of good faith.[29] Therefore, in an effort to distinguish Native American Church peyote use from other religious use of drugs, courts have resorted to inquiries for which they are institutionally ill-suited, and they have depended on distinctions that are without constitutional significance.

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[28] *See, e.g.*, *State v. Rocheleau*, 451 A.2d 1144, 1149 (1982) (although court did not question sincerity of religious beliefs, it found it difficult to believe defendant in fact was practicing his religion in the restroom of a nightclub); *United States v. Kuch*, 288 F.Supp. at 443-44 (pantheistic Neo-American Church of "Boo Hoos" whose tenets appeared to be founded on mockery of religion rather than sincere religious beliefs).

[29] *See, e.g.*, *United States v. Rush*, 738 F.2d at 512 (government willing to stipulate that Ethiopian Zion Coptic Church members held sincere beliefs in religious marijuana use); *State v. Blake*, 695 P.2d at 338 n. 5 (citing cases where sincerity of religious use of marijuana has been assumed). *But, cf.*, *Leary v. United States*, 383 F.2d at 856-60 (detailing exteusive evidence of sincerity of belief in religious drug use, but rejecting it as "irrelevant" given strength of legislative judgment that marijuana use must be regulated).

Many courts have attempted to scrutinize the importance or centrality of religious drug use to a particular religion or religious practice. Where drug use is optional, the claims for constitutional protection have failed.[30] Even in those instances where a drug is taken as a sacrament to facilitate an individual's communion with his god, and where individuals have claimed that drug use is "essential" to their religion, courts have concluded that drug use was not sufficiently central to the religion to be protected.[31] These holdings distinguish Native American Church peyote ingestion and other religious drug use by embroiling the courts in theological judgments about the tenets of religious beliefs and their importance to an individual's spiritual development. They have done so even though those inquiries are beyond judicial competence. *E.g.*, *Lyng v. Northwest Indian Cemetery Protective Assoc.*, 485 U.S. ___, 108 S.Ct. 1319, 1329-30 (1988); *Texas Monthly, Inc. v. Bullock*, ___ U.S. ___, 109 S.Ct. 890, 902-03 (1989) (plurality and concurring opionions); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. at 715.

Aside from possible theological differences between peyotism and other religions that use drugs, there is little to distinguish the claims for first amendment protection. Like claimants here, other religious adherents seeking constitutional protection for religious drug use have been considered sincere.[32] As just discussed, religious drug use in other churches or by other individuals is a central component of their religious practices. Like members of the Native American Church, others have professed that their religious drug use minimizes the dangers associated with the drug. Several, in fact, have presented evidence to support their claims or at least to show that the dangers of a particular drug's use are open to debate.[33] Indeed, some people have been willing to modify their religious drug use in ways designed to provide some assurance that the dangers of use were minimized.[34] Finally, although the historical roots of a religious practice should have little bearing beyond establishing that a belief is religious in nature and sincere, other religiously motivated drug use appears to have ancient roots or to be traceable to settled religious doctrine as old or older than that of the Native American Church.[35]

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[30] *See, e.g.*, *Leary v. United States*, 383 F.2d at 860 (fact that Leary's marijuana facilitated communion with his god but was not a mandatory requirement of traditional Hindu practices defeated free exercise claim); *State v. Blake*, 695 P.2d at 339 (free exercise claim failed in part because use of marijuana is an optional Hindu practice).

[31] *See, e.g.*, *State v. Rocheleau*, 451 A.2d at 1149 (rejecting free exercise claim of citizen who subscribed to Tantric Buddhism and believed in marijuana use as a spiritual means to better communicate with his god); *People v. Mullins*, 123 Cal. Rptr. 201, 50 Cal. App.3d 61 (1975) (offer of proof that marijuana permits individual to commune with his god, that it is an object and sacrament of his religious beliefs, that he cannot commune with his god without it, and that it is "essential" to his exclusively religious ritual, fell short in establishing that use of the drug was important enough to his religion to be constitutionally protected).

The only way courts have "accommodated" religious drug use is to extend constitutional protection on the basis of a

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[32] *See* cases cited earlier in footnote 29.

[33] *E.g., Leary v. United States*, 383 F.2d at 860 (court rejected as "irrelevant" Leary's evidence that marijuana was harmless, had therapeutic value, and had long been used safely by religious sects in India); *United States v. Rush*, 738 F.2d at 512 (court declined to consider evidence that marijuana can be used safely); *Whyte v. United States*, 471 A.2d at 1021 (court would not consider evidence that religious practices minimized dangers of drug use); *United States v. Middleton*, 690 F.2d 820, 825 (11th Cir. 1982) (harm of particular drug in question, and fact that marijuana is on lower schedule than peyote, irrelevant to analysis).

[34] *See, e.g., Olsen v. Lawn*, appeal pending in the United States Court of Appeals for the District of Columbia (C.A. No. 86-0236), Memorandum of Court-Appointed Amicus Curiae at 29 (offering to restrict religious practices and their frequency to satisfy governmental concerns about the safety of marijuana use).

[35] *See, e.g.*, cases discussed and cited earlier beginning at page 18.

narrow, ethnocentric model. *See, e.g., Peyote Way Church of God, Inc. v. Meese III*, 698 F.Supp. 1342 (N.E. Tex. 1988) (exemption for Native American Church only is a permissible political choice by Congress; constitution does not protect religious peyote use by individuals who left Native American Church because broadening the exemption would defeat compelling regulatory purpose).[36] Similarly, the few states that have legislatively created exemptions have done so only for peyotists in organized churches, and frequently only for the Native American Church. *See* fn. 26. The tacit reasoning underlying these denomination-based exemptions is that, while government's interest in drug control is sufficiently compelling to justify a total ban on dangerous drugs in society at large, that interest is not significantly compromised if the door is merely cracked open to permit the drug use of one minority religion. The large-scale success of the Native American Church in obtaining exemptions and the wholesale failure of any other church or individual to be extended the same protection also suggests that on some unarticulated basis, Native American Church peyote use has simply achieved a level of political acceptance that no other religious belief has been able to win.

These exemptions also are unmistakably influenced by the incorrect assumption that Native American Church members live and practice their religion as a discrete and insular minority, far removed from the mainstream of American life. The poetic image of a few Native Americans "using peyote one night at a meeting in a desert hogan," *People v. Woody*, 394 P.2d at 821, is a powerful appeal to our respect for and deference to the ancient ways of the Native American.

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[36] *See also United States v. Rush*, 738 F.2d at 513 (limiting religious drug use exemptions to Native American peyote use on theory that Native Americans are *sui generis*); *United States v. Warner*, 595 F.Supp. 595 (D.C. N.D. 1984) (holding that exemption does not and constitutionally is not required to extend to non-Native American member of Native American Church).

But this case illustrates that the image is false. Not all Native Americans are peyotists.[37] Not all peyotists are Native Americans. And Native American Church members are not all refugees from modern society. They are a part of its fabric. They are our lawyers, our doctors, and truck drivers, our teachers and our alcohol and drug counselors. In Oregon, an estimated 89 percent of the state's more than 27,000 Native Americans live and work in urban areas. Or. Secretary of State, 1989-90 Oregon Blue Book (1989), p. 332. It is wrong to conclude that religious peyote use can be accommodated on the assumption that its practitioners exist only apart from contemporary society.

Even if the ethnic stereotype of Native American Church members were accurate, it would not warrant an exemption from drug laws only for that single denomination. In matters of religion, the constitution does not permit cracking the door open in such a way as to permit one government-favored religion to pass through, and to deny passage to all others. Under settled Free Exercise and Establishment Clause principles, government cannot show partiality to any one religious group or promote one religion over the other. *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968); *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952).[38] Religious

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[37] *See, e.g., Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959) (challenge by Native American Church to Navajo Tribe's prohibition of peyote).

[38] As a general proposition, any kind of legislative exemption directed to one denomination only rather than to all religions on like terms is indefensible under Establishment Clause principles. *See generally Waltz v. Tax Comm'n of the City of New York*, 397 U.S. 664 (1970) (sustaining tax against Establishment Clause challenge because it did not single out one particular church or religious group or even religious activities only); *Thornton v.*

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drug use must be accommodated, if at all, on the basis of neutral principles that extend the Constitution's protection to all religions on the same terms. Thus, under the Free Exercise Clause, the door to religious drug use must be opened fully if it is opened at all. That result would have devastating consequences for government in its efforts to control dangerous drug use and to enforce its regulations.

Equally important, to hold that religious drug use is constitutionally protected would mean more than simply exempting drug use from criminal prohibitions. Once the constitution extends protection to religious conduct, it properly extends that protection on several fronts. Society becomes obligated to "accommodate" religious practices in work places, in government programs, and in other public and private settings.

This case provides a graphic example. As noted at the outset, this is an unemployment benefits case, not a criminal prosecution. The ultimate question here is not whether Smith and Black must go to prison for their religious drug use. It is whether the state must provide special unemployment compensation to them under circumstances where any other citizen, not a member of the Native American Church, would be denied those benefits out of hand. If the constitution protects claimants' drug use as they claim it does, then an employer who has every right otherwise to insist on a drug-

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Caldor, 472 U. (1985). It may be, nevertheless, that the special nature of the relationship between Congress and Native Americans provides justification for the preferential treatment accorded Native American religious peyote use under the federal Controlled Substances Act. We therefore do not address the difficult question of the constitutional validity of the denomination-specific federal exemption, or the more difficult question of the validity of parallel state exemptions. We note, however, that the special relationship between tribes and Congress would not easily provide any analytical tools to deal with religious peyote use by non-Native American members of the Native American Church, such as claimant Black. That relationship also would have no bearing on state obligations under the Free Exercise Clause.

free workplace and on policies of abstinence can be forced to compromise those wholly legitimate interests. The private drug and alcohol counseling organization in this case, in fact, is now subject to a consent decree arising out of Title VII litigation brought on Smith's behalf by the Equal Employment Opportunity Commission. *See* Resp. in Opp. to Pet. Cert., Appendix A. As a result of that litigation, this private employer must "accommodate" claimants' religious practices by having drug and alcohol counselors on staff who do not subscribe to the employer's treatment philosophies and who are unwilling to provide the kind of role model that the counseling oranization believes it must provide.[39] *See also, Toledo v. Model-Sysco, Inc.*, 651 F.Supp 483 (D. N.M. 1986) (successful religious discrimination suit against trucking company which refused to hire Native American when he disclosed religious peyote use).

Other cases also demonstrate the range of claims that can flow from constitutional protection for religious drug use. Inmates have sued to require state prisons to accommodate their religious peyote use by permitting them to hold the peyote ceremony within prison walls. *Indian Inmates of Nebraska Penitentiary v. Grammer*, 649 F.Supp. 1374 (D. Neb. 1986), *aff'd*, 831 F.2d 301 (1987). Government has had to defend against civil liability claims based on allegations that law enforcement officials unlawfully arrested a Native American and seized his peyote without first holding a hearing to inquire whether his peyote possession was religiously protected. *Golden Eagle v. Johnson*, 493 F.2d 1179 (9th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). While claims of this type have not all prevailed, government nevertheless finds itself in litigation over them. It thus risks affirmative monetary exposure when it tries to determine when the constitution protects drug use, or when its interests in areas such as prison security and uniform law enforcement procedures weigh more heavily than an individual's interest in religious drug use. *See also, Warner v. Graham*, 845 F.2d 179 (8th Cir. 1988) (civil damages suit against government for discharging drug and alcohol educator who, in earlier criminal prosecution for religious peyote use, was held not to be entitled to constitutional protection because she was not a Native American).

Protection for religious drug use, if it constitutionally attaches, would thus extend to all areas where religion must be accommodated, not just to the application of criminal laws. Stated only in general terms, that conclusion would mean society must "accommodate" religious drug use practices. But more specifically and more accurately, it would require society to tolerate the presence and use of dangerous drugs in settings where it otherwise may insist that citizens remain drug free.

The Free Exercise Clause does not compel that result. It is sometimes an unforunate reality that to guarantee "religious freedom to a great variety of faiths requires that some religious practices yield to the common good." *United States*

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[39] The affidavits submitted in claimant Smith's case demonstrate a significant professional disagreement between the Native American Church and the private employer over appropriate methods of treating alcoholism. One of the church's "fundamental purposes" is to promote the sobriety of its members. (Smith Rec. Exh. 7, Aff. of Reverend Emmerson Jackson, National President of the Native American Church, at p. 1). The ingestion of peyote in the Native American Church is viewed as helping participants "to control and overcome a problem with alcohol." (Smith Rec. Exh. 7, Aff. of Dr. Robert Bergman, p. 2). The ceremony is considered to have "beneficial effects on recovered or recovering alcoholics, by providing spiritual strength to help with their problem. In addition to the religious and health benefits of the tepee ceremony, a major result is to encourage participants to avoid the use of alcohol in their daily lives." (Smith Rec. Exh. 7, Aff. of Stanley Smart, Native American Road Chief, at p. 2). Whatever the merits of these claims, this theory of treatment obviously clashes head-on with the employer's philosophy of total abstinence and the employer's desire that its recovering counselors model that behavior for clients attempting to overcome alcohol and other substance dependencies. (Smith Rec. Exh. 3; Black Rec. 9, Exh. 2).

v. Lee, 455 U.S. at 133. Religious use of hallucinogens and other dangerous drugs simply is not compatible with society's compelling interest in controlling and eliminating drug use and abuse. Accordingly, for the same reasons that constitutional protection has been denied to members of the Ethiopian Zion Coptic Church, to Hindus, to Tantric Buddhists, to Rastafarians and to the many individuals and organized churches that have sought protection for religious drug use, constitutional protection must be denied in this case.

CONCLUSION

The decision of the Oregon Supreme Court, holding that the first amendment protects Native American Church peyote ingestion from the reach of the state's neutral criminal law prohibition, should be reversed. The case should be remanded to the Oregon Supreme Court with instructions that it vacate its judgment and reinstate the Employment Appeals Board's order denying unemployment benefits.

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APPENDIX

STATE LAWS REGULATING PEYOTE

Statute Prohibiting or Scheduling Peyote	Schedule or Listing	Express Exemption for Religious Peyote Use
Ala. Code § 20-2-23(3)(l) (1984)	I	
Alaska Stat. § 11.71.150(b)(16) (1983)	IIA	
Ariz. Rev. Stat. Ann. § 36-2512.3(p) (1988)	I	Ariz. Rev. Stat. Ann. § 13-3402(b)(1-3) (1988)
Arkansas †		
Cal. Health and Safety Code § 11054(d)(15) (West Supp. 1989)	I	
Colo. Rev. Stat. § 12-22-309(2) (1985)	I	Colo. Rev. Stat. § 12-22-317(3) (1985)
Conn. Gen. Stat. Ann. § 21a-242(a)(C) (West 1985)	I	
Del. Code Ann. Health & Safety 16 § 4715 (1983)	I	
D.C. Code Ann. § 33-514(3)(O) (1988)	I	
Florida Stat. Ann. § 893.03(c)(26) (West Supp. 1989)	I	
Ga. Code Ann. § 79A-806(3)(K) (1984 and Supp. 1988)	I	
Haw. Rev. Stat. § 329-14(d)(19) (Supp. 1988)	I	
Idaho Code § 37-2705(d)(17) (Supp. 1988)	I	

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† Schedules adopted by administrative rule only rather than by statute. Administrative rules of other states were not available.

‡ State has not adopted uniform act.

Statute Prohibiting or Scheduling Peyote	Schedule or Listing	Express Exemption for Religious Peyote Use
Ill. Ann. Stat. ch. 56 ½ para. 1204 § 204(d)(12) (Smith-Hurd Supp. 1988)	I	
Ind. Code Ann. § 35-48-2-4(d)(17) (Burns 1988)	I	
Iowa Code Ann. § 204.204.4(p) (West 1987)	I	Iowa Code Ann. § 204.204(8) (West 1987)
Kan. Stat. Ann. § 65-4105(d)(16) (1985)	I	Kan. Stat. Ann. § 65-4116(c)(8) (1985)
Ky. Rev. Stat. Ann. § 218A.050(3) (Michie/ Bobbs-Merrill 1982)	I	
La. Rev. Stat. Ann. § 40:964(C)(11) (West Supp. 1989)	I	
Me. Rev. Stat. Ann. tit. 17-A § 1102.2(C) (1983)	X	
Md. Ann. Code art. 27, § 279(c)(9) (1988)	I	
Mass. Gen. Laws Ann. ch. 94C § 31 (West 1984)	Class C	
Mich. Comp. Laws Ann. § 333.7212(1)(c) (West 1980)	I	
Minn. Stat. Ann. § 152.02(4) (West 1989)	I	Minn. Stat. Ann. § 152-02(4) (West 1989)
Miss. Code Ann. § 41-29-113(c)(14) (Supp. 1988)	I	
Mo. Ann. Stat. § 195.017(4)(l) (Vernon Supp. 1989)	I	

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† Schedules adopted by administrative rule only rather than by statute. Administrative rules of other states were not available.

‡ State has not adopted uniform act.

Statute Prohibiting or Scheduling Peyote	Schedule or Listing	Express Exemption for Religious Peyote Use
Mont. Code Ann. § 50-32-221(3)(l) (1987)	I	
Neb. Rev. Stat. § 28-405(c)(12) (1985)	I	
Nevada ‡		Nev. Rev. Stat. § 453.541 (1987)
New Hampshire †		
N.J. Stat. Ann. § 24:21-5(e)(12) (West Supp. 1988)	I	
N.M. Stat. Ann. § 30-31-6(C)(12) (Supp. 1988)	I	N.M. Stat. Ann. § 30-31-6(D) (Supp. 1988)
N.Y. Public Health Law § 3306(d)(16) (McKinney Supp. 1989)	I	
N.C. Gen. Stat. § 90-89-(c)(11) (Supp. 1988)	I	
N.D. Cent. Code § 19-03.1.05(5)(p) (Supp. 1987)	I	
Ohio Rev. Code Ann. § 3719.41(C)(17) (Anderson Supp. 1988)	I	
Okla. Stat. Ann. tit. 63 § 2-204(C)(11) (West 1984)	I	
Or. Admin. R. 855-80-020 (1987)	I	
35 Pa. Stat. Ann. tit. 35 § 780-104(iii)(11) (Purdon 1977)	I	
1982 R.I. Gen. Laws § 21-28-2.08(d)(12) (1982)	I	

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† Schedules adopted by administrative rule only rather than by statute. Administrative rules of other states were not available.

‡ State has not adopted uniform act.

Statute Prohibiting or Scheduling Peyote	Schedule or Listing	Express Exemption for Religious Peyote Use
S.C. Code Ann. § 44-53-190(d)(12) (Law. Co-op. 1985)	I	
S.D. Codified Laws Ann. § 34-20B-14 (1984)	I	S.D. Codified Laws Ann. § 34-20B-14 (1986)
Tenn. Code Ann. § 39-6-406(c)(11) (1982)	I	
Tex. Rev. Siv. Stat. Ann. art. 4476-15 § 4.02(d)(8) (Vernon Supp. 1989)	3	Tex. Rev. Civ. Stat. Ann. art. 4476-15 § 4.11 (Vernon Supp. 1989)
Utah Code Ann. § 58-37-4(2)(a)(i) (1986)	I	
Vt. Stat. Ann. tit. 18 § 4201(10)(1982)	‡	
Va. Code Ann. § 54.1-3446.3 (1988)	I	
Wash. Rev. Code Ann. § 69.50.204(15) (1989)	I	
W.Va. Code § 60A-2-204(d)(15) (1989)	I	
Wisc. Stat. Ann. § 161.14(4)(m) (West 19[illegible]	I	Wisc. Stat. Ann. § 161.115
Wyo. Stat. § 35-7-1014(d)(xvi) (1988)	I	Wyo. Stat. § 35-7-1044 (1988)

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† Schedules adopted by administrative rule only rather than by statute. Administrative rules of other states were not available.

‡ State has not adopted uniform act.

RESPONDENT'S

BRIEF

No. 86-1213

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CLERK

In The
Supreme Court of the United States
October Term, 1986

EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF OREGON,
W.E. HUNTER, ADMINISTRATOR,

Petitioners,

v.

ALFRED L. SMITH,
GALEN W. BLACK, AND ADAPT,

Respondents.

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76

QUESTIONS PRESENTED

1. Has the Oregon Supreme Court decided as a matter of state law that the criminality of the religious use of peyote by respondents is irrelevant to a determination of eligibility under Oregon's unemployment compensation scheme, making this case indistinguishable from prior decisions of the Court?

2. Has the Oregon Supreme Court refused to decide whether the religious use of peyote is criminal as a matter of Oregon law in the absence of a criminal prosecution of respondents, and does the lack of a decision on this issue make impossible for this Court to render a decision on the federal constitutional issue presented by petitioners?

3. Does the Free Exercise Clause require that a State's law enforcement interest in proscribing dangerous drugs be treated as compelling for purposes of deciding whether the religious use of peyote by respondents, members of the Native American Church, can be accommodated, in the face of substantial evidence showing that such accommodation has no law enforcement effect for the twenty-three states and the federal government which exempt such use?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT OF THE CASE.......................... 1

SUMMARY OF ARGUMENT.......................... 3

ARGUMENT

I. THE RESOLUTION OF STATE LAW ISSUES MAKES THIS CASE INDISTINGUISHABLE FROM PRIOR DECISIONS OF THIS COURT AND PREVENTS RESOLUTION OF THE CONSTITUTIONAL QUESTION PRESENTED BY PETITIONERS 5

A. The Oregon Supreme Court has Decided as a Matter of State Law that the State's Interest in Proscribing Drug Use is Irrelevant to Oregon's Unemployment Compensation Law.................................. 5

B. The Oregon Supreme Court Did Not Answer the Question Posed by this Court, Whether the Religious Use of Peyote is Criminal Under Oregon Law............. 8

II. RESPONDENTS ARE ENTITLED TO THE RECEIPT OF UNEMPLOYMENT BENEFITS UNDER PRIOR DECISIONS OF THIS COURT 14

A. The Facts of This Case Lead to a Clear Conclusion Under This Court's Precedents 14

B. The Possible Criminality of Religious Use of Peyote in This Case Does Not Distinguish it From the *Sherbert-Thomas* Line of Precedents 20

TABLE OF CONTENTS – Continued

Page

III. THE EXPERIENCE OF OTHER STATES AND THE FEDERAL GOVERNMENT IN EXEMPTING RELIGIOUS USE OF PEYOTE AND IN DEALING WITH RELIGIOUS CLAIMS FOR DRUG USE SHOWS THAT NO LAW ENFORCEMENT PROBLEMS HAVE ARISEN AND THAT OTHER DRUG BASED FREE EXERCISE CLAIMS ARE UNLIKELY TO PREVAIL 32

IV. THE FREE EXERCISE CLAUSE REQUIRES SPECIAL ACCOMMODATION FOR RESPONDENTS' RELIGIOUS PRACTICES TO ENSURE EQUAL TREATMENT OF MAJORITY AND MINORITY RELIGIONS AND PREVENT INADVERTENT PROHIBITION OF RELIGIONS 38

V. THE WRITS SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED 41

A. The Criminality of Respondents' Conduct Cannot Distinguish this Case from *Sherbert* Because the Criminality of Their Conduct Cannot be Determined as a Matter of Oregon Law Based Upon the Record Before the Court 41

B. The Question of Whether or Not Respondents Engaged in Criminal Conduct Which the State Can Use to Deny Them Unemployment Benefits is Not Ripe for Review Since There Has Been No Criminal Prosecution.................................... 42

C. The Present Case is Moot and Will Not be Affected by a Decision of This Court..... 44

TABLE OF CONTENTS – Continued

Page

VI. EXEMPTING THE RELIGIOUS USE OF PEYOTE BY MEMBERS OF THE NATIVE AMERICAN CHURCH FROM CRIMINAL PROSCRIPTION DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE UNITED STATES CONSTITUTION AND IS CONSISTENT WITH CONGRESSIONAL AUTHORITY OVER INDIAN AFFAIRS 45

CONCLUSION 47

Appendix A.................................... A-1

Defendant's Exhibit No. 9, *Peyote Way Church of God v. Meese III*, 698 F. Supp. 1342 (N.D. Tex. 1988) A-1

Appendix B B-1

Texas Drug Laws, Including Rules Relating to the Controlled Substances Act §§ 4.11, 13.23-13.27, 13.35 *et seq.*, Texas Department of Public Safety Criminal Enforcement Division (1987-88).......................... B-1

TABLE OF AUTHORITIES

Page

CASES:

Abbott Laboratories v. Gardiner, 587 U.S. 136 (1967) .42, 43

Black v. Employment Div., 301 Or. 221, 721 P.2d 451 (1986) 5

Bowen v. Roy, 476 U.S. 693 (1986) 14

Braunfeld v. Brown, 366 U.S. 599 (1961) 16, 17, 38

Cantwell v. Connecticut, 310 U.S. 296 (1940).......... 16

Cleveland v. United States, 329 U.S. 14 (1946)......... 16

County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 57 U.S.L.W. 5045 (U.S. June 27, 1989) 39, 46

County of L.A. v. Davis, 440 U.S. 625 (1979).......... 45

Duro v. District Attorney, 2d Judicial District of North Carolina, 712 F.2d 96 (4th Cir. 1983), *cert. denied*, 465 U.S. 2006 (1983)....................... 40

Employment Division v. Smith, 108 S.Ct. 1444 (1988) 1, 2, 5, 6, 9, 13

Everson v. Board of Education of Ewing, Tp., 330 U.S. 1 (1947).. 38

Fellowship Baptist Church v. Bertrum, 815 F.2d 485 (8th Cir. 1987)..................................... 40

Frazee v. Employment Security Dept., 109 S.Ct. 1514 (1989) 14, 15, 17, 18, 19, 39, 48

Goldman v. Weinberger, 475 U.S. 503 (1986)........... 14

Hobbie v. Unemployment Appeals Com'n of Florida, 480 U.S. 136 (1987) 14, 15, 17, 18, 19, 21, 46

TABLE OF AUTHORITIES – Continued

Page

Indiana Employment Security Div. v. Burney, 409 U.S. 540 (1972) 44

Jacobson v. Massachusetts, 197 U.S. 113 (1905) 16

Leary v. United States, 383 F.2d 851 (5th Cir. 1967) 34

Lynch v. Donnelly, 465 U.S. 668 (1984) 39

NAACP v. Button, 371 U.S. 415 (1963) 16

Native American Church of New York v. United States, 468 F. Supp. 1247 (S.D. N.Y. 1979), *aff'd mem.*, 633 F.2d 205 (2d Cir. 1980) 34, 47

Olsen v. Drug Enforcement Admin., No. 86-1442 and No. 86-5455, slip op. (D.C. Cir., June 20, 1989) 26, 28, 33, 36, 37, 41

Oregon Medical Ass'n. v. Rawls, 281 Or. 293, 574 P.2d 1103 (1978) 10

People v. Woody, 61 Cal.2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964) .... *passim*

Peyote Way Church of God v. Messe, 698 F. Supp. 1342 (N.D. Tex. 1988) 26

Prince v. Massachusetts, 321 U.S. 158 (1944) 16

Reynolds v. United States, 98 U.S. 145 (1879) 16

Rice v. Rehner, 463 U.S. 713 (1983) 46

Salem College & Academy, Inc. v. Emp. Div., 298 Or. 471, 695 P.2d 25 (1985) 9

Shabazz v. O'Lone, 482 U.S. 342 (1987) 14

Sherbert v. Verner, 374 U.S. 398 (1963) .... *passim*

TABLE OF AUTHORITIES – Continued

Page

Smith v. Employment Div., 301 Or. 209, 721 P.2d 445 .... *passim*

Smith v. Employment Div., 307 Or. 68, 763 P.2d 146 (1988) .... *passim*

State v. Whittingham, 19 Ariz. App. 27, 504 P.2d 950 (1973) 33

Sterling v. Cupp, 290 Or. 611, 625 P.2d 123 (1981) 9

Thomas v. Collins, 323 U.S. 516 (1945) 17

Thomas v. Review Board of Ind. Employment Sec. Div., 450 U.S. 707 (1981) .... *passim*

United States v. Ballard, 322 U.S. 78 (1944) 21

United States v. Lee, 455 U.S. 252 (1982) .. 14, 30, 31, 32

Wisconsin v. Yoder, 406 U.S. 205 (1972) .... *passim*

CONSTITUTION:

U.S. CONST. amend. I 6, 7, 14, 17, 38

STATUTES:

18 U.S.C. § 1154 46

18 U.S.C. § 1155 46

18 U.S.C. § 1156 46

18 U.S.C. § 1161 46

18 U.S.C. § 1162(a) 41

21 U.S.C. § 817(c) 47

21 U.S.C. § 952 47

TABLE OF AUTHORITIES – Continued

Page

25 U.S.C. § 2401, *et seq*. 47

42 U.S.C. § 1996 47

National Prohibition Act of 1919, c.85, Title II, § 3, 41 Stat. 308 (1919) (repealed 1935) 39

ORS 28.200 *et seq*. 10

ORS 471.335 46

ORS 471.430 46

ORS 472.405(2) 46

ORS 475.992(4)(a) 10, 12

REGULATIONS:

21 C.F.R. § 1307.3 (1988) 33, 35, 47

Texas Drug Laws, 1987-1988 .... 35, 36

TEXTS:

S. Pepper, *Reynolds, Yoder, and Beyond: Alternatives for the Free Exercise Clause*, 1981 UTAH L. REV. 309 14

S. Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. REV. 299 (1986) 14

S. Pepper, *The Conundrum of the Free Exercise Clause – Some Reflections on Recent Cases*, 9 N.KY. L. REV. 265 (1982) 14

Stewart, Omer C., *Peyote Relgion; A History*, pp. 217-21 (University of Oklahoma Press, Norman 1987) 47

W. LaBarre, *The Peyote Cult* 29,224 (4th ed. 1975) 40

STATEMENT OF THE CASE

Petitioners' statement of the case is not correct. Respondents' statement of facts from Respondents' Brief in *Employment Division v. Smith*, 108 S.Ct. 1444 (1988) (hereinafter "Employment Div.") is supplemented here with subsequent facts. *Employment Div.*, Brief for Respondents, pp. 1-5.

In March, 1986, respondents' employer, ADAPT, entered into a consent decree in federal court, under which it agreed that the religious use of peyote by Native American Church members would no longer be considered work-related misconduct. Resp. Brief in Opposition to Petition for Writ of Certiorari, App. A. On September 25, 1987, the Oregon State Board of Pharmacy adopted a permanent rule exempting non-drug use of peyote in bona fide ceremonies of the Native American Church from Schedule I of Oregon's Controlled Substances Act. Resp. Brief in Opposition to Petition for Writ of Certiorari, App. B. The Board suspended this rule at the urging of the State Attorney General's office.

Respondents filed for unemployment benefits with the Oregon Employment Division. The Employment Appeals Board denied respondents' state and federal constitutional Free Exercise claims. The Board found that the state's interest in proscribing the use of dangerous drugs was the compelling state interest that justified denying the claimant unemployment benefits. *Smith v. Employment Div.*, 307 Or. 68, 71, 763 P.2d 146, 147.

On review the Oregon Supreme Court rejected petitioners' holding that the state's law enforcement interest in proscribing peyote was relevant in unemployment compensation proceedings. *Smith v. Employment Div.*, 301 Or. 209, 721 P.2d 445. The Court reserved decision on whether *governmental* conduct disqualifying a person from employment or public benefits by reason of religious conduct would violate the Oregon Constitution. *Id.* Finding that the state's interest was the same as that asserted in prior decisions of the United States Supreme Court, *e.g.*, *Sherbert v. Verner*, 374 U.S. 398 (1963); and *Thomas v. Review Board of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981), the Court upheld respondents' Free Exercise claim under the United States Constitution.

This Court granted certiorari. Based on petitioners' assertion that the Oregon Supreme Court had ignored Oregon's law enforcement interests only because they were constrained to under *Sherbert* and *Thomas*, this Court remanded the cases for resolution of state law issues. *Employment Div. v. Smith*, 108 S.Ct. 1444 (1988).

On remand, the Oregon Supreme Court reaffirmed that the criminality of religious use of peyote was irrelevant as a matter of state law to a determination of eligibility for unemployment benefits. *Smith v. Employment Div.*, 307 Or. 68, 71, 763 P.2d 146, 147 (1988), and therefore this case was indistinguishable from *Sherbert* and *Thomas*. *Id.* The Court refused to decide whether religious use of peyote was criminal under Oregon law. 307 Or. at 73 n.3; 763 P.2d at 148 n.3. At the request of this Court, the Oregon Supreme Court addressed whether religious use of peyote could be validly proscribed under the federal constitution, and concluded that it could not. 307 Or. at 73-76, 763 P.2d at 148-50.

◆

SUMMARY OF ARGUMENT

Based on *Smith v. Employment Div.*, 307 Or. 68, 763 P.2d 146 (1988), the present case is indistinguishable from the prior holdings of this Court, which concluded that the State's interest in protecting the fiscal integrity of its unemployment fund was not sufficient to infringe upon sincere religious practices. The State in this case concedes that respondents have a sincere belief in the practice of their religion.

This ruling disposes of the present case as a matter of state law. At the request of the United States Supreme Court, however, the Oregon Supreme Court discussed the criminality of the religious use of peyote under Oregon law and under the United States Constitution. The Court refused to resolve the state constitutional question. Because the state law question has not been decided by the Oregon courts, it is premature for this Court to decide the question presented to it by petitioners. If petitioners wish to have this question decided, they must pursue it in other forums.

Even if criminality of the religious use of peyote were an issue, respondents are entitled to prevail under the previous decisions of this Court. Oregon's interest in proscribing dangerous drugs is not affected by exempting the religious use of peyote by the Native American Church, based on experience of other governments. Since Oregon's law enforcement interests can be accomplished without proscribing the religious use of peyote, and since such proscription would in effect destroy the Native American Church, the Free Exercise Clause protects the religious use of peyote from prohibition under state law.

No danger exists that upholding an exemption for the religious use of peyote from state law proscriptions of dangerous drugs will lead to a law enforcement problem with peyote or a "flood" of other Free Exercise claims. The experience of other governments such as Texas, where peyote is grown, shows that the strict regulations and controls already placed on use of peyote by the Native American Church have prevented any law enforcement problems. All other claims to religious use of drugs by other religions have been rejected under review standards already in existence. The unique beliefs and practices associated with the Native American Church make it unlikely that fraudulent claims for religious drug use will arise in other situations.

It is the function of the Supreme Court to review Free Exercise claims when minority religious beliefs and conduct are infringed by otherwise valid laws of general application. If general state interests in secular-based subjects are permitted to subsume minority based religious beliefs and conduct because of the need for uniformity, without the possibility of review under the Free Exercise Clause, minority religions will be in constant danger of interference and even extirpation.

An exemption for the religious use of peyote by the Native American Church does not violate the Establishment Clause. It is directed at the unique circumstances of the Native American Church, which are not found in any other religion, and the exemption does not function as a governmental endorsement of the Native American Church. In addition, plenary congressional authority over Indian affairs and the long history of congressional involvement in regulation of peyote use by Native Americans militates against any disruption of the pervasive federal and state regulatory scheme which exempts religious use of peyote by the Native American Church.

◆

ARGUMENT

I.

THE RESOLUTION OF STATE LAW ISSUES MAKES THIS CASE INDISTINGUISHABLE FROM PRIOR DECISIONS OF THIS COURT AND PREVENTS RESOLUTION OF THE CONSTITUTIONAL QUESTION PRESENTED BY PETITIONERS

A. The Oregon Supreme Court Has Decided As A Matter Of State Law That The State's Interest In Proscribing Drug Use Is Irrelevant To Oregon's Unemployment Compensation Law

The present controversy is the result of confusion over the issue before this Court when certiorari was granted in *Employment Div., Dept. of Human Resources of the State of Or. v. Smith*, 108 S.Ct. 1444 (1988) (hereinafter "Employment Div."), reviewing the decisions of the Oregon Supreme Court in *Smith v. Employment Div.*, 301 Or. 209, 721 P.2d 445 (1986) (hereinafter "Smith I"), and *Black v. Employment Div.*, 301 Or. 221, 721 P.2d 451 (1986). Petitioners argued in these cases that the Oregon Court had ignored the criminality of peyote use in Oregon in its analysis of the federal constitutional issue because it was bound *as a matter of federal law* to ignore that interest. *E.g.*, Tr., pp. 5-6.[1] The state conceded that this argument was not apparent from the face of the Oregon Supreme Court's opinion. Tr. at 7.

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[1] All references to Tr. are to the transcript of the oral argument in *Employment Div.*, which took place on December 8, 1987.

There was some sentiment among this Court that the case would not have been granted certiorari if the Oregon Supreme Court in *Smith I* had decided that the criminality of peyote use in Oregon was irrelevant *as a matter of state law* to the determination of whether respondents were entitled to unemployment benefits under the Free Exercise Clause of the United States Constitution.[2] Tr. at 25. The State admitted that if this was the correct reading of *Smith I*, its burden of persuasion would be difficult to carry since the case would then be indistinguishable from *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981). Tr. at 13. The State argued that the Oregon Supreme Court did not make this decision as a matter of state law, and requested that the case be remanded for the Oregon Court to reconsider the state's "health and safety interest in the context of the [unemployment] scheme at issue." *Id.*

This Court apparently agreed that there was some confusion over the legal basis for the Oregon Supreme Court's decision in *Smith I*: "Whether the state court believed that it was constrained by *Sherbert* and *Thomas* to disregard the State's law enforcement interest, or did so because it believed petitioner to have conceded that the legality of respondent's conduct was not in issue, is not entirely clear." *Employment Div.*, 108 S.Ct. 1448 (1988). The case was remanded to receive "further guidance concerning the status of the [religious use of peyote] as a matter of Oregon law." *Id.* at 1457.

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[2] U.S. CONST. amend. I.

On remand the Oregon Supreme Court addressed (1) the criminality of peyote use in Oregon and whether such criminality is relevant to Oregon's unemployment compensation law; (2) whether prosecuting members of the Native American Church for sacramental use of peyote would violate the Oregon Constitution; and (3) whether outright prohibition of good faith religious use of peyote by adult members of the Native American Church would violate the First Amendment.[3] *Smith v. Employment Div.*, 307 Or. 68, 763 P.2d 146 (1988) (hereinafter "Smith II").

The Oregon Supreme Court on remand addressed state law issues in two different contexts as they relate to resolution of the First Amendment question. First, the Court addressed its decision in *Smith I* and why it disregarded the criminality of peyote use in Oregon. Quoting the language of its first decision (301 Or. at 218-19, 721 P.2d at 450), the Court reaffirmed that as a matter of state law, "[w]e . . . stated that it was immaterial to Oregon's unemployment compensation law whether the use of peyote violated some other law." *Smith II*, 307 Or. at 71, 763 P.2d at 147.

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[3] In *Employment Div.* this Court opined that it "*may* ultimately be necessary to decide whether the ingestion of peyote for sincerely held religious reasons is a form of conduct that is protected by the Federal Constitution from the reach of a State's criminal laws." 108 S.Ct. at 1451 (emphasis added). The Oregon Supreme Court in *Smith II*, however, decided that the criminality of peyote in Oregon is irrelevant to the present case as a matter of state law, making it unnecessary to decide this question.

In *Smith I*, the Court disagreed with the administrative ruling of the Oregon Employment Appeals Board that the state's interests in implementing Oregon's unemployment compensation statutes included proscribing the use of dangerous drugs as well as the state's interest in protecting the financial integrity of the unemployment insurance fund. 301 Or. at 218-19, 721 P.2d at 450-51. The Court held that the state's interest in denying unemployment benefits to those discharged for religiously motivated misconduct is limited as a matter of state law to interests found in the unemployment compensation statutes and does not encompass state criminal interests. *Id.* The criminality of religious use of peyote had no relevance to the unemployment compensation statutes as applied. *Id.* The Oregon Court in *Smith II* reaffirmed its holding in *Smith I* that the state's interest was the same which the United States Supreme Court has previously found insufficient "to override interests of unemployment compensation claimants in the free exercise of their religion," 307 Or. at 71-72, 763 P.2d at 147, and therefore held it was following this Court's rulings in *Sherbert* and *Thomas*. *Id.*[4]

B. The Oregon Supreme Court Did Not Answer The Question Posed By This Court Whether The Religious Use Of Peyote Is Criminal Under Oregon Law

After reaffirming the holding of *Smith I*, the Oregon Supreme Court in *Smith II* discussed this Court's request that it address "the status of the [religious use of peyote] as a matter of Oregon law," 108 S.Ct. at 1451, and refused to answer the question since it would require the court to "give an advisory opinion. . . ." 307 Or. at 73 n. 3, 763 P.2d at 148 n.3.[5] The Court made this holding because no criminal case was before it and because Oregon's civil compensation procedure is neither designed nor equipped to resolve issues of the applicable mental state and changing burdens of proof surrounding guilt or innocence of an uncharged and untried crime.

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[4] This ruling by the Oregon Supreme Court, *see* Sec. V, A, *infra*, is not addressed by petitioners in their pleadings.

Petitioners argue that "[t]he Oregon Supreme Court concluded that the conduct is criminal under Oregon law." Brief for Petitioners at 4. This assertion is incorrect. What the Oregon Court *did* conclude is that "*the Oregon statute* against possession of controlled substances, which include peyote, makes no exception for the sacramental use of peyote . . . ." 307 Or. at 72-73; 763 P.2d at 148 (emphasis added). This is not a conclusion of criminality under Oregon law. As this Court noted in *Employment Div.*, the process of "State action" to resolve Oregon law is a *two-step process*, the second step of which consists of analyzing the state's *constitutional law*. 108 S.Ct. 1447 at n.9 (quoting *Sterling v. Cupp*, 290 Or. 611, 614, 625 P.2d 123, 126 (1981); *See also Salem College & Academy, Inc. v. Emp. Div.*, 298 Or. 471, 484, 695 P.2d 25 (1985).

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[5] While the Oregon Supreme Court refused to decide the state constitutional law issue in *Smith II*, the Court has suggested through its extensive quotations of *People v. Woody*, 61 Cal.2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964), that it would follow the holding of *Woody* as a matter of state constitutional law if presented with an actual criminal case.

The Oregon Supreme Court in *Smith II* only took the first step, when it noted that the statute on its face makes all use of peyote illegal. Since no actual criminal case was before it,[6] the Court did not, and could not as a matter of Oregon law,[7] issue an advisory opinion on whether "prosecuting members of the Native American Church under ORS 475.992(4)(a) for sacramental use of peyote would violate the Oregon Constitution." 307 Or. at 73 n. 3, 763 P.2d at 148 n. 3. A decision by the Oregon courts on the state constitutional issue is a necessary predicate to final resolution of whether the religious use of peyote is criminal under Oregon law. The Oregon Supreme Court did not answer the question for which this case was remanded. It would therefore be premature for this Court to answer the question posed by petitioners. *See* Section V, B, *infra*.

Petitioners attempt to argue, as they must for this Court to answer the question which they have presented, that the Oregon Supreme Court *has* decided the state constitutional law question in *Smith I*. Brief for Petitioners at 3-4. The ruling by the Oregon Supreme Court in *Smith I* was different than the state constitutional law question presented to the Oregon Court in *Smith II*.

---

[6] Claimants Smith and Black have never been charged with any criminal conduct out of the incidents in this case.

[7] *E.g.*, *Oregon Medical Ass'n. v. Rawls*, 281 Or. 293, 574 P.2d 1103 (1978). Oregon law provides a procedure for certification of questions of law from the United States Supreme Court to the Oregon Supreme Court, ORS 28.200 *et seq*, but that procedure was not followed in this case.

In *Smith I*, the Oregon Supreme Court addressed the constitutionality under the Oregon Constitution of a state policy which permits an *employer* to impose conditions on employment that conflict with the employee's particular religious practices or beliefs. 301 Or. at 216, 721 P.2d at 448. The unemployment statute and administrative rule which permit an employer to impose its own standards of work conduct operate in a neutral manner both on their face and as applied. *Id.* As the Oregon Court concluded: "If claimant's freedom to worship has been interfered with, that interference was committed by his employer, not by the unemployment statutes." *Id.*

The Court in *Smith I* expressly reserved the question of whether *governmental* rules disqualifying a person from public benefits for religious conduct would survive scrutiny under the Oregon constitution:

> We do not imply that a governmental rule or policy disqualifying a person from employment or from public services or benefits by reason of conduct which rests on a religious belief or a religious practice could not impinge on the religious freedoms guaranteed by Article I, sections 2 and 3 . . . . But here it was not the government that disqualified claimant . . .

Id. at 216, 721 P.2d at 449. Governmental policy is precisely the issue which petitioners are now presenting. Petitioners ask that a governmental rule – the Oregon statute proscribing the use of dangerous drugs, including peyote, be applied to disqualify respondents from public benefits – unemployment compensation – by virtue of conduct which rests on a religious belief or practice – the ingestion of peyote as the central ceremony of the Native American Church.

In *Smith II* the Oregon Supreme Court refused to resolve this issue as a matter of state constitutional law because the state never criminally prosecuted respondents, and because the Oregon unemployment compensation procedure is neither designed nor equipped to determine guilt or innocence of an uncharged and untried crime. 307 Or. at 73 n. 3, 763 P.2d at 148 n. 3. As the Court concluded: "Because no criminal case is before us, we do not give an advisory opinion on the circumstances under which prosecuting members of the Native American Church under ORS 475.992(4)(a) for sacramental use of peyote would violate the Oregon Constitution." *Id.*

Petitioners ask this Court to decide two matters of state law which should be addressed in other forums. First, petitioners ask that the Oregon Supreme Court be required to accept the state's interest in proscribing dangerous drugs as an additional *state* interest in implementing Oregon's unemployment scheme. *See e.g.*, Tr. at 6. As discussed above, however, the Oregon Supreme Court in both *Smith I* and *Smith II* decided as a matter of state law that Oregon's interest in proscribing dangerous drugs is irrelevant to the state's unemployment scheme.

Petitioners' prayer for relief asks this Court to order the Oregon Supreme Court to reinstate the holding of the Employment Appeals Board in this case, Brief for Petitioners at 36, that "the state's interest in proscribing the use of dangerous drugs was the compelling interest that justified denying the claimant unemployment benefits." *Smith I*, 301 Or. at 218-19, 721 P.2d at 450. This prayer inappropriately asks this Court to overrule the Oregon Supreme Court on matters of state law. If petitioners wish this state interest to be considered in unemployment compensation hearings, the proper remedy is to ask the state legislature to make it relevant in such hearings.[8]

Second, petitioners ask this Court to find that the Oregon Supreme Court decided that the religious use of peyote is criminal under Oregon law. *E.g.*, Brief for Petitioners at 4. As discussed above, the Court has not decided that question. The issue presented by petitioners is therefore not ripe for this Court to decide as a matter of federal constitutional law. *See Employment Div.*, 108 S.Ct. at 1451.

The burden to make this issue ripe rests squarely on the State. The Oregon Supreme Court has clearly stated that it will not decide the issue under Oregon law in the absence of an actual criminal case. The State has not prosecuted respondents for their conduct. Only if the State does so in this or another case may it be appropriate for this Court to address the federal constitutional question. Even under this scenario, Oregon cannot deny claimants unemployment benefits in the absence of a state legislative decision to make criminality of peyote use relevant in unemployment proceedings.

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[8] In *Employment Div.*, this Court stated in dicta that if a state validly prohibits the religious use of peyote and that prohibition is consistent with the Federal Constitution, the State "is free" to withhold unemployment compensation from claimants for such conduct. 108 S.Ct. at 1451. This principle would still require states to *make the choice* through legislation to deny unemployment compensation for such conduct.

II.

RESPONDENTS ARE ENTITLED TO THE RECEIPT OF UNEMPLOYMENT BENEFITS UNDER PRIOR DECISIONS OF THIS COURT.

A. The Facts Of This Case Lead To A Clear Conclusion Under This Court's Precedents

This Court has articulated a standard in previous decisions to resolve conflicts between religious expression under the Free Exercise Clause of the United States Constitution[9] and the interests of government in regulating societal conduct.[10] Consistent analysis has resulted in a uniform line of decisions in cases such as the one presented by respondents,[11] even though different factual situations have sometimes led to a different result.[12] In all

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[9] U.S. Const., amend. I.

[10] A number of articles have traced the evolution of the Free Exercise Clause in this Court. *See, e.g.*, S. Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. Rev. 299 (1986); S. Pepper, *The Conundrum of the Free Exercise Clause - Some Reflections on Recent Cases*, 9 N.Ky. L. Rev. 265 (1982); S. Pepper, *Reynolds, Yoder, and Beyond: Alternatives for the Free Exercise Clause*, 1981 Utah L. Rev. 309.

[11] *Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Review Bd., Ind. Empl. Sec. Div.*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Com'n of Florida*, 480 U.S. 136 (1987); *Frazee v. Employment Security Dept.*, 109 S.Ct. 1514 (1989).

[12] *E.g., United States v. Lee*, 455 U.S. 252 (1982) (national tax); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (institutional interest); *Shabazz v. O'Lone*, 482 U.S. 342 (1987) (prisons). *See Bowen v. Roy*, 476 U.S. 693 (1986) (majority follows *Sherbert-Yoder* test where governmental conduct infringes religious beliefs, explained in *Hobbie*, 480 U.S. at 141-42).

cases where claimants for unemployment benefits have been denied such benefits because of their religious beliefs and activities, this Court has ruled that the state's disqualification of claimants for unemployment benefits constitutes an unconstitutional burden on the free exercise of claimants' religion.

The first case to articulate the standard now used was *Sherbert v. Verner*, involving a member of the Seventh-Day Adventist Church who was discharged by her employer for refusing to work on Saturday. 374 U.S. at 398. The state Employment Security Commission denied her unemployment benefits because she failed without good cause to accept "suitable" work. *Id.* at 401. In *Thomas v. Review Bd., Ind. Empl. Sec. Div.*, the petitioner quit his job when he was transferred to a military production job in violation of his beliefs as a Jehovah's Witness. The state Employee Security Division denied his benefits because a voluntary termination motivated by religion was not good cause objectively related to the work. 450 U.S. at 712.

In *Hobbie v. Unemployment Appeals Comm'n*, an employee converted to the Seventh Day Adventist Church and informed her employer that she could no longer work on her Sabbath. She was discharged, and the state Unemployment Appeals Commission denied benefits because her refusal to work scheduled shifts constituted misconduct connected with her work. 480 U.S. at 138. In *Frazee v. Employment Security Dept.*, the claimant refused to work on Sundays because of his general Christian beliefs. He was denied unemployment benefits by the state Employment Security Department, which distinguished *Sherbert* on the basis that his refusal to work was not based on tenets or dogma of an established religious sect. 109 S.Ct. at 1516.

In *Sherbert* the Court stated that while the Constitution permits no governmental regulation of religious *beliefs*, 374 U.S. at 402 (citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940)), freedom of religious conduct is "not totally free from legislative restrictions." 374 U.S. at 403 (citing *Braunfeld v. Brown*, 366 U.S. 599 (1961)). In such cases, "[t]he conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." *Id.* (citing *Reynolds v. United States*, 98 U.S. 145 (1879); *Jacobson v. Massachusetts*, 197 U.S. 113 (1905); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Cleveland v. United States*, 329 U.S. 14 (1946)). Where no such threat exists, denial of unemployment benefits is permissible only where: 1. the disqualification as a beneficiary represents no infringement by the State of the constitutional rights of free exercise; or 2. because any incidental burden on the free exercise of a claimant's religion may be justified by a compelling state interest in the regulation of a subject within the State's constitutional power to regulate. 374 U.S. at 403 (citing *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

Thomas contains the definitive statement of this standard:

> The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. However, it is still true that "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion."

450 U.S. at 718 (*quoting Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)).

The *Sherbert* decision holds that disqualification from state unemployment benefits because of religiously motivated conduct constitutes a burden on the free exercise on a claimant's religion "if the purpose or effect of a law is to impede the observance of one or all religions," even if the burden is indirect. 374 U.S. at 404 (citing *Braunfeld*, 366 U.S. at 607)). This is the first part of the test stated above.

The second part of the test is more complex. The Court has analyzed the nature of the state interest asserted, whether the interest is compelling, and if so, whether the interest justifies the substantial infringement of First Amendment rights. The Court stated in *Sherbert*: "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, [o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation . . . ." 374 U.S. at 406 (citing *Thomas v. Collins*, 323 U.S. 516, 530 (1945)). If the state interest is compelling and the regulation would infringe on First Amendment rights, the state must demonstrate that no alternative forms of regulation avoiding Free Exercise infringement exist.

In the four unemployment cases, the state interest has always been protecting the fiscal integrity of the unemployment fund and preventing fraud and deceit. *Sherbert*, 374 U.S. at 407; *Thomas*, 450 U.S. at 718-19; *Hobbie*, 480 U.S. at 139-141; *Frazee*, 109 S.Ct. at 1518.

This Court has repeatedly rejected attempts by States to alter the standard used to resolve these cases because of factual differences in the cases presented. In *Sherbert* the claimant was discharged by her employer and belonged to a recognized religious sect. Since then the Court has rejected state decisions denying unemployment benefits which alleged that the claimant's beliefs were not well articulated or formulated and that intrafaith differences existed about the claimant's religious beliefs, *Thomas*, 450 U.S. 707, that *Sherbert* and *Thomas* had only involved discharge actions by the employer, *Hobbie*, 480 U.S. 136; that the claimant caused her own termination by converting to a new faith after beginning employment, *Id.*; that the employee was discharged for "misconduct" connected with her work, *Id.*; and that the claimant was not a member of an established religious sect whose beliefs were not from a tenet, belief, or teaching of an established religious body. *Frazee*, 109 S.Ct. 1514.

In this case the Oregon Supreme Court has stated both times that "[t]he state's interest [in denying respondents unemployment compensation for religious conduct] is simply the financial interest in the payment of benefits from the unemployment insurance fund to this claimant and other claimants similarly situated." *Smith II*, 307 Or. at 71, 763 P.2d at 147 (citing *Smith I*, 301 Or. at 219, 721 P.2d at 450). The Court has twice rejected petitioner's attempt to introduce an asserted criminal state interest, *Id.*, as a distinguishing factor.

The Court did not reject this interest because it was constrained to do so by *Sherbert* and *Thomas*, but becausethe interest in proscribing peyote was irrelevant *as a matter of state law* to Oregon's unemployment scheme.

Id. Since the state's interest is limited to fiscal integrity of the unemployment fund, the Oregon Court held that it was following *Sherbert* and *Thomas*, because this interest cannot override a Free Exercise claim. *Smith II*, 307 Or. at 71-72, 763 P.2d at 147.

The Oregon Supreme Court's reaffirmation in *Smith II* of its decision in *Smith I* of this state law decision cannot be avoided as petitioners attempted to do when this case was before this Court earlier in *Employment Div.*, and there is nothing to distinguish the present case from this Court's prior unemployment decisions in *Sherbert*, *Thomas*, *Hobbie* and *Frazee*. Respondents urge the Court to affirm the decision of the Oregon Supreme Court in *Smith II* on this basis.

It is because this case is indistinguishable from the *Sherbert-Thomas* line of decisions, however, that petitioners seek to inject a new element into the analysis – the alleged criminality of respondents' conduct. Without it there would be no controversy to be decided by this Court; with it petitioners attempt to create a new issue where none now exists.

Petitioners' attempt to assert this criminal issue in the present case is fraught with problems. The Oregon Supreme Court has decided that criminality of respondents' conduct is irrelevant to unemployment compensation eligibility. *Smith II*, 307 Or. at 71, 763 P.2d at 147. Criminality under Oregon law has never been determined. *See* Sec. I, B, *infra*. Even if the ingestion of peyote for religious purposes were criminal under Oregon law, the criminality of respondents' conduct has never been an issue in this case. It was not an element in discharging respondents from their employment with ADAPT. Respondents were discharged from ADAPT for ingesting a drug, not because the drug they ingested was illegal. As ADAPT suggested during the unemployment compensation appeal process, respondents might also have been discharged if they had taken sacramental wine at a Christian ceremony, an admittedly legal activity.[13]

Petitioners argue that criminality in and of itself, as an abstract concept not related to the facts of the present case, must alter this Court's constitutional analysis and conclusion. Since the language of the Free Exercise Clause on its face is absolute ("no law . . . prohibiting the free exercise"), however, the power of a state to infringe the constitutional right of respondents to practice their religion cannot be judged in the abstract.

B. The Possible Criminality Of Religious Use Of Peyote In This Case Does Not Distinguish It From The *Sherbert-Thomas* Line Of Precedents

Even if criminality of the conduct in this case is considered, it should not alter the result. The decision of the Oregon Supreme Court in *Smith II* is correct in its analysis of the Federal Constitution under *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Yoder* the respondents had been "charged, tried and convicted" of violating a state compulsory-attendance law, and had been fined. *Id.* at 208. Despite the criminality of respondents' conduct and

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[13] *See* Joint Appendix at 35-37, *Employment Div.* (Statement of John L. Desmet discussing increased risk of relapse incurred by abstaining alcoholics who use sacramental wine).

its direct application to the case, this Court applied the *Sherbert-Thomas* analysis in resolving the constitutional issue. Petitioners cannot prevail without overcoming the *Yoder* decision and the fact that criminality has not been decided in this case.[14]

The *Yoder* decision contains an extensive discussion of criminality as it affects the *Sherbert-Thomas* Free Exercise analysis:[15]

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[14] In dicta in *Employment Div.*, this Court stated: "The protection that the First Amendment provides to *'legitimate* claims to the free exercise of religion,' *see Hobbie*, 480 U.S. at 142, does not extend to conduct that a State has validly proscribed." 108 S.Ct. at 1451 (emphasis in original). In *Yoder* the Court found that the state's interest in universal education is of the highest rank and that a state compulsory-attendance law is generally a valid method of carrying out this responsibility. 406 U.S. at 213-14. Therefore, unless there is some other distinguishing factor which is not readily apparent on the face of this dicta in *Employment Div.* the statement appears to be an overruling of *Yoder sub silentio*. The Court's reference to "legitimate" claims to the free exercise of religion is taken from *Yoder*, 406 U.S. at 215. This Court has stated a number of times that courts may not decide "the truth, validity, or reasonableness of a claimant's religious beliefs." *Hobbie*, 480 U.S. at 144 n. 9 (citing *United States v. Ballard*, 322 U.S. 78, 87 (1944); *see Thomas*, 450 U.S. at 715. In *Employment Div.*, this Court noted that the Oregon Supreme Court had concluded "that the Native American Church is a recognized religion,that peyote is a sacrament of that church, and that respondents' beliefs were sincerely held." 108 S.Ct. at 1449.

[15] As discussed in the first section of this brief, the criminality of respondents' conduct in this case under Oregon law has not been established. Sec. I, *supra*.

> Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment . . . .
>
> It follows that in order for [the state to validly compel] school attendance against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause . . . .
>
> . . . We can accept it as settled therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.

406 U.S. at 214-15 (citations omitted). Petitioners would overturn this rule, asserting that this criminal statute should be insulated from any judicial review even if it affects important constitutional interests.

This Court specifically rejected this test in *Yoder*:

> But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under the regulations of general applicability. This case, therefore, does not become easier because respondents were convicted for their "actions" in refusing to send their children to the public high school; in this context belief and action cannot be neatly confined in logic-tight compartments.

> Nor can this case be disposed of on the grounds that [the criminal statute] applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion, or that it is motivated by legitimate secular concerns. A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.

Id. (citations omitted). In this case Oregon seeks to have the criminality of respondents conduct considered in the abstract. Under *Yoder*, criminality does not end the inquiry even in an actual criminal case; it is but one element to be considered.

The Court in *Yoder* applied the same searching inquiry of the State's asserted criminal interests as it had previously applied in *Sherbert* in a civil context. The Court held that the appropriate constitutional analysis applies not to the state's asserted *general* interest (in the present case the state's general interest in proscribing dangerous drugs), but rather to the far narrower interest in enforcing this interest against a specific group when it burdens the practice of their religion:

> We turn, then, to the State's broader contention that its interest . . . is so compelling that even the established religious practices of the [specific denomination] must give way. Where fundamental claims of

> religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by [the standards set out in its criminal statute], and the impediment to these objectives that would flow from recognizing the claimed [denominational] exemption.

Id. at 221 (citation omitted). The Supreme Court found the arguments of the State on potential effects on the Amish by being exempted from compulsory school attendance to be "highly speculative," *Id.*, and rejected the State's claims: "[I]t would require a more particularized showing from the State on this point to justify the severe interference with religious freedom such [state regulation] would entail." *Id.*, at 227.

In the present case petitioners have presented no specific evidence showing that exempting the Native American Church's use of peyote would frustrate Oregon's interest in proscribing dangerous drugs. But as *Sherbert* suggests, it is the State's burden to be more specific. 374 U.S. 407. The Oregon Supreme Court in *Smith II* adopted the findings of the California Supreme Court in *People v. Woody*, 61 Cal. 2d 716, 722, 394 P.2d 813, 40 Cal. Rptr. 69, (1964): "The experience of states that exempted bona fide religious use of peyote from the prohibition did not support any compelling state interest in suppressing it."[16] 307 Or. at 74, 763 P.2d at 149. Instead

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[16] The Oregon Supreme Court did not examine the experience of states since *Woody* was decided – 1964 – consistent with its holding that it could not issue an advisory opinion in the absence of an actual criminal case. *See* 307 Or. at 73 n. 3, 763

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petitioners rely on general speculative fears about the drug problem in the United States in an attempt to lump the highly regulated and limited religious use of peyote by the Native American Church with other drugs that are used almost exclusively for improper purposes.

A review of petitioners' alleged interests in proscribing the religious use of peyote shows that the actual experience of permitting such use does not bear out petitioners' fears.[17] It is important to note that Oregon stands alone of states with significant populations of Native American Church members in prohibiting religious use of peyote. At least 23 states as well as the federal government exempt the religious use of peyote from criminal proscription. *See Smith II*, 307 Or. at 72 n. 2,

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P.2d at 148 n. 3: "We do not now reexamine the background recited in *People v. Woody, supra*, nor the question on what kind of record such a claim should be examined in the future." *Id.*

Petitioners assert that changes in society since *Woody* was decided now justify regulation of the religious use of peyote, Brief for Petitioners at 27, but offer no concrete evidence of any effect peyote use has had. Clearly the evidence is to the contrary. *See* Sec. III, *infra*. The Court in *Yoder* rejected a similar argument that beliefs of the Amish were now (in 1972) out of step with the requirements of society for a highly educated citizenry, 406 U.S. at 216-17, and that changes in society diminish the legitimacy and importance of religious beliefs.

[17] The actual practice of using peyote in ceremonies of the Native American Church is explained in more detail in Brief of Amicus Curiae of the Native American Church *et al.* in *Employment Division v. Smith* to show the uniqueness of the Church and why an exemption for the Church will not result in a "myriad" number of exemptions for the religious use of other drugs or other churches.

763 P.2d at 148 n. 2. It is disingenuous for petitioners to argue that exempting the religious use of peyote will undermine "[t]he drug laws adopted by the states and the federal government [which] depend on uniformity and comprehensiveness to be effective," Brief for Petitioners at 23, when interested states and the federal government *uniformly* exempt the religious use of peyote from criminal proscription. Only Oregon disrupts the uniformity of this exemption; other states and the federal government have specifically rejected the view asserted by petitioners.

Second, the facts of peyote use, both legal (religious) and illegal, do not support petitioners' assertions about problems with regulating it. The recent United States Court of Appeals for the District of Columbia's opinion in *Olsen v. Drug Enforcement Admin.*, No. 86-1442 and No. 86-5455, slip op. (D.C. Cir., June 20, 1989), includes an order from the administrator of the Drug Enforcement Administration (DEA) exempting the religious use of peyote on a national level because the exemption presents no law enforcement problems. *Id.* at 16. DEA statistics show that a total of *19 pounds* of illegal peyote was seized during an eight year period while *one million* times as much marijuana was seized during the same period. *Id.* at 12. Respondents include as an appendix to this brief an exhibit from the trial in *Peyote Way Church of God v. Meese*, 698 F. Supp. 1342 (N.D. Tex. 1988), showing that Texas regulations strictly control and account for all legitimate peyote use, without any law enforcement problems.

During oral argument in *Employment Div., see* Tr. at pp. 9-11, petitioners asserted that peyote cannot be safely used by anyone and is a danger to the user and community.[18] *See also* Brief for Petitioners at 14, 21-22. Petitioners' assertion is not borne out by experience. Native Americans' religious use of peyote has been documented since the 16th Century. There is no evidence that such use has had any detrimental effect on the users, *see, e.g., Smith II*, 307 Or. at 73, 763 P.2d at 148. In addition, petitioners present no evidence from the 23 states which permit the religious use of peyote or the federal government of any detrimental effect on users or the community of exempting such use. Petitioners' failure to provide any evidence of the alleged detrimental effects demonstrates that no problem exists. Petitioners' assertions are speculative.[19]

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[18] Petitioners cite several authorities for the proposition that ingestion of peyote poses a severe risk to human health and well-being. Brief for Petitioners at 14, n. 8. This attempt to present a one-sided view of peyote is not supported; at best the authority on this issue is mixed. Respondents presented authority which conflicts with petitioners' assertions in *Employment Division*. *See* Joint Appendix, pp. 18-25 (religious use of peyote not harmful and has rehabilitative effects); Respondents' Reply Brief, pp. 20-21, n. 11. *See also, People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 818, 40 Cal. Rptr. 69 (1964).

[19] Petitioners assert that even if peyote can be safely used in religious ceremonies, Oregon would have to "intrude" into the ceremony to monitor for "responsible" use. Brief for Petitioners at 22. This assertion is spurious and is the type of unsupported claim rejected by the Court in *Thomas*, 450 U.S. 718-19. (Court rejects Indiana's claim that employers would have to conduct detailed inquiry into claimants' religious beliefs if religious exemption to unemployment scheme is upheld, finding no evidence in the record that such inquiries have occurred in Indiana or any other states.) No other states or the federal government monitor Native American Church ceremonies, and there is no evidence of health and safety problems in those states.

A second reason asserted by petitioners for the necessity of outlawing peyote is that lawful use of peyote will compound the problem of controlling drug trafficking in the United States and that it will be difficult to distinguish between legal and illegal traffic. Tr. at 10, Brief for Petitioners at 23-24. The express finding of the DEA Administrator in *Olsen* belies this argument. Slip op. at 12. DEA statistics show that there is virtually no illegal trafficking in peyote, and Texas regulatory statistics show that peyote is tightly controlled and strictly accounted for. *See* Appendix A. The DEA Administrator has ruled that religious use of peyote in circumscribed Native American Church ceremonies can be accommodated and has no impact on the drug trafficking problem. *Olsen*, Slip op. at 17, 18.[20]

Finally, petitioners assert that to permit the religious use of peyote would subject Native American Church "ministers" to assault by those who desire peyote for illegal use. Tr. at 10; Brief for Petitioners at 24. This argument is insupportable.[21] The problem of illegal trafficking in peyote (less than *three pounds* per year nationally) is not sufficient to place peyote "roadmen" at a danger level that can be measured. Petitioners provide no evidence from any of the 23 states that permit religious use of peyote of an illegal diversion of peyote or assaults on those who possess it. Petitioners' assertions on this point are purely imaginary.

If the State of Oregon is permitted to proscribe the religious use of peyote by the Native American Church under the Federal Constitution, and the Oregon Supreme Court does decide that religious peyote use is criminal under Oregon law, the adverse impact on respondents' religious beliefs and the activities of the Native American Church in Oregon will be "inescapable." *Yoder*, 406 U.S. at 218. As in *Yoder*, members of the Native American Church would be forced to "either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region." *Id.* Oregon's proscription of religious use of peyote "would gravely endanger if not destroy the free exercise of respondents' religious beliefs." *Id.* at 219. Respondents submit that petitioners have failed to meet the burden necessary to justify infringing respondents' religious practices protected under the Free Exercise Clause of the Constitution.

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[20] Petitioners concede in their brief that if the government can "accommodate" a religion-based exemption for drug use without compromising its interest in controlling dangerous drug use, the Free Exercise Clause requires it to do so. Brief for Petitioners at 16. The DEA's holding that peyote use by the Native American Church can be accommodated is based on this principle. *Olsen*, slip op. at 12, 16.

[21] Petitioners put forward several ethnocentric descriptions of the "poetic image" of Indian people in their "desert hogans" in 1964, "far removed from the mainstream of American life," and assert that exemption for religious use of peyote by the Native American Church was granted only because of this idyllic image. Brief for Petitioners at 30-32. As respondents have discussed before, the experience of the states which permit religious peyote use, as well as the experience of the federal government, does not substantiate any law enforcement problems due to urbanization of the Indian population.

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United States v. Lee, 455 U.S. 232 (1982), a case involving a Free Exercise exemption from a national uniform tax where Congress had already granted a limited religious exemption for those who opposed the tax is consistent with this discussion. *Id.* at 256. Petitioners cite *Lee* for support, but the decision is inapposite to respondents and the relatively small number of adherents of the Native American Church. As Justice Stevens stated in his concurrence in *Lee*: "Arguably . . . laws intended to provide a benefit to a limited class of otherwise disadvantaged persons [referring to *Sherbert*, *Thomas* and *Yoder*] should be judged by a different standard than that appropriate for the enforcement of neutral laws of general applicability." *Id.* at 263 n.3 (Stevens, J. concurring).

Petitioners make two factual distortions in support of their contention that *Lee* applies here. First, they argue that the proscription against peyote use is a uniform law of general applicability whose enforcement would be thwarted if religious use is exempted. Brief for Petitioners at 11-15. The religious use of peyote is almost *uniformly exempted* from proscription by the federal government and by states with significant numbers of Native American Church members. *Smith II*, 307 Or. at 7 n. 2, 763 P.2d at 148 n. 2. Oregon is the only state with a significant population of Native American Church members to not exempt religious peyote use by statute or judicial decision. Moreover, even in Oregon, there is no indication of any enforcement against Native American Church members.

Respondents in this case ask only that they be granted the exemption that has already been granted by Congress to other members of the Native American Church. *See Smith II*, 307 Or. at 75, 763 P.2d at 149 (description of congressional exemptions for religious use of peyote). Respondents are not asking this Court to expand that exemption, as respondents were asking in *Lee*. This issue is not before this Court in this case and is not an issue in unemployment proceedings.

Petitioners also allege that the "persistence" of other religious claims for constitutional exemptions for drug use, Brief for Petitioners at 19, proves that there will be "myriad exemptions flowing from a wide variety of religious beliefs" if respondents' constitutional claim to religious use is upheld. Brief for Petitioners at 10, 17-23 (citing *Lee*, 455 U.S. at 259-60). This case involves only the Native American Church. The practices, beliefs and history of the Native American Church are so unique and well-defined that it is unlikely that they will be duplicated by any other religious group. As discussed in Section III, *infra*, the cases cited[22] show that all courts to address the issue have been able to distinguish between the Native American Church and the claims of other religions.[23] For example, there is no record of any legislative or judicial expansion of the existing exemption.

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[22] *See* n. 27, *infra*.

[23] Petitioners allege at one point that to permit an exemption for religious use of peyote in this case would "shift a heavy, perhaps insurmountable burden" to the government to disprove Free Exercise defenses in other criminal prosecutions. Brief for Petitioners at 24. This assertion is spurious. The use of peyote by the Native American Church is well-defined and circumscribed. Outside of these unique circumstances, the burden would be on a *defendant* to prove a Free Exercise right in any criminal prosecution.

III.

THE EXPERIENCE OF OTHER STATES AND THE FEDERAL GOVERNMENT IN EXEMPTING RELIGIOUS USE OF PEYOTE AND IN DEALING WITH RELIGIOUS CLAIMS FOR DRUG USE SHOWS THAT NO LAW ENFORCEMENT PROBLEMS HAVE ARISEN AND THAT OTHER DRUG BASED FREE EXERCISE CLAIMS ARE UNLIKELY TO PREVAIL

As discussed in Section II, the final step of any Free Exercise Clause inquiry requires the court to determine whether accommodating the religious practice in question will unduly interfere with the fulfillment of the stated governmental interest.[24]

In the present case the State of Oregon has failed to show that an exemption for the religious use of peyote by the Native American Church will have any effect on the state's law enforcement interest. Petitioners emphasize Oregon's general interest in enforcing its laws proscribing illegal drugs and of the danger of peyote,[25] *see* Brief for Petitioners at 12-16, but present no evidence of an actual effect on that interest. The experience of the federal government and of the 23 states that exempt the religious use of peyote from criminal proscription is that no law enforcement problems have arisen,[26] and that governments can accommodate carefully circumscribed religious use of peyote by members of the Native American Church without significantly jeopardizing such law enforcement interests. *E.g., Olsen v. Drug Enforcement Admin.*, No. 86-1442 and No. 86-5455, slip op. (D.C. Cir., June 20, 1989). Petitioners have offered no evidence to rebut these facts.

Petitioners present only broad speculation to support its contention that it cannot accommodate the Native American Church's religious peyote use. Speculation as to some future harm to the government's stated interest has consistently failed to survive Free Exercise scrutiny. *See Sherbert*, 374 U.S. at 407; *Yoder*, 406 U.S. at 224-25. The courts and legislatures of several states and the federal government have demonstrated little difficulty distinguishing religious-based peyote use by Native American Church members from religious use of other drugs by other religious sects.[27]

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[24] This standard of inquiry, clearly established by the Court's precedents, is particularly applicable in Free Exercise cases where, as in the present case, the state is seeking to deny a religious exemption under laws intended to provide a benefit to a limited class of otherwise disadvantaged persons. *See, e.g., United States v. Lee*, 455 U.S. at 263, n. 3 (Stevens, J., concurring).

[25] Respondent does not question that Oregon's general interest in enforcing the State's drug laws for other drugs among the population at large is compelling. However, the nature of a balancing test requires that laws advancing compelling governmental interests must yield to religious practices where accommodating the practice fails to jeopardize the state interest, regardless of how compelling the interest may be. *See generally Yoder*, 406 U.S. 205 (1972).

[26] The federal exemption is found at 21 C.F.R. § 1307.3 (1988). *See* Appendix of Brief for Petitioners for a list of states maintaining an exemption and relevant statutory citations. Arizona and California have judicially created exemptions resting on the First Amendment of the Federal Constitution. *See State v. Whittingham*, 19 Ariz. App. 27, 504 P.2d 950 (1973); *People v. Woody*, 61 Cal.2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

[27] Petitioners cite a number of cases in their brief to assert that states have experienced great difficulty in resolving Free

(Continued on following page)

The Constitutional protection sought by respondents, if granted, would in no way create a broad shield for other drug-based religions and necessitates only a narrow exemption, similar in scope to the existing congressional and administrative exemption for nondrug peyote use by

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(Continued from previous page)

Exercise claims by other drug-based religions. Brief for Petitioners at 19-22. These decisions prove, however, that the courts have been easily able to make such distinctions. No religion other than the Native American Church has been able to sustain a claim for religious drug use. For example, *Woody* has been the law for twenty-five years in California, and petitioners cannot show a single documented case of fraudulent use of peyote or any other drug as a result of that decision.

The very cases petitioners cite to support the claim that governmental neutrality would be compromised by forcing courts to grant one exemption for religious drug use and not another support precisely the opposite conclusion. For example, in *Woody*, the Supreme Court of California premised their exemption for peyote use by Native American Church members, in part, upon the ability of courts as neutral fact-finders to examine the sincerity of a church's belief in deciding the worthiness of its claim for an exemption from state law. 394 P.2d at 821. In *Native American Church of New York v. United States*, 468 F. Supp. 1247 (S.D. N.Y. 1979), *aff'd mem.*, 633 F.2d 205 (2d Cir. 1980), the trial court easily distinguished peyote from other psychedelic drugs in flatly denying the Church's claim for a general psychedelic drug exemption and upholding a limited exemption for peyote. *See also Leary v. United States*, 383 F.2d 851, 861 n. 11 (5th Cir. 1967) (The exemption accorded the use of peyote in the limited bona fide religious ceremonies of the relatively small, unknown Native American Church is clearly distinguishable from the private and personal use of marihuana [sic] by any person who claims he is using it as a religious practice).

the Native American Church and its members as is the narrow exemption granted to the Amish in *Yoder*.[28] The Native American Church's own tenets[29] dictate that nonreligious use of peyote is sacrilegious and prohibit Church members from using or distributing the drug outside of its legally exempted context. Thus 21 C.F.R. § 1307.31 creates an exemption only for the very narrow religious use of peyote contemplated by the Church itself and encompasses the very practice here at issue.

Regulations promulgated by the Department of Public Safety for the State of Texas[30] currently control most of the limited legal sale and distribution of peyote for use by members of the Native American Church under federal and state exemptions. *See* Appendix B. These regulations control the distribution of peyote and require distributors of peyote to register with the State (§ 13.35, App. B, *infra*, at B-8 to B-10), to sell only to the licensed distributors and to authorized, properly identified church members intending to use the peyote in bona fide religious ceremony (§ 13.36, App. B, *infra*, at B-10 to B-12) and to furnish quarterly receipts of peyote sales to the regulatory agency (§ 13.37, App. B, *infra*, at B-12 to B-14). The regulations strictly limit purchases of peyote to those individuals who can provide certification of their membership in the Native American Church (§ 13.41, App. B, *infra*, at B-15 to B-17).

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[28] The federal exemption, located at 21 C.F.R. § 1307.31, states in full: "The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration. Any person who manufactures peyote for or distributes peyote to the Native American Church, however, is required to obtain registration annually and to comply with all other requirements of law."

[29] In *Woody*, the court elaborated on the sacred nature of peyote in the tenets of the Church: "Although peyote serves as a sacramental symbol similar to bread and wine in certain Christian churches, it is more than sacrament. Peyote constitutes in itself an object of worship; prayers are directed to it much as prayers are devoted to the Holy Ghost. On the other hand, to use peyote for nonreligious purposes is sacrilegious." *Woody*, 394 P.2d at 817.

[30] The plant Lophora williamsii, the small spineless cactus producing peyote, grows in the United States principally in the Rio Grande Valley of Texas. *Woody*, 394 P.2d at 816. Legal sales of peyote under the federal exemption are regulated by the Criminal Enforcement Division of the Texas Department of Public Safety under the Texas Drug Laws. The regulations are set out in the agency's booklet entitled: *Texas Drug Laws*, 1987-1988, relevant provisions of which are reproduced in Appendix B to this Brief.

The strictly controlled use of peyote by Native American Church members does not threaten the state interest in proscribing illegal drugs, nor does it sanction or promote drug use outside of a narrow religious context. The carefully crafted Texas regulations and the Church proscriptions of nonreligious peyote use together provide a narrow regulatory framework in which only Church members may purchase and use peyote for purely religious ceremonial use. The regulations provide important safeguards in the handling and distribution of peyote in the only state where it grows naturally, preventing any general danger of drug use.

In *Olsen v. Drug Enforcement Admin.*, the court easily distinguished the federal exemption for Native American Church peyote use from that sought by the Ethiopian Zion Coptic Church. Slip op. at 12. Affirming a prior order by the Drug Enforcement Administration that denied Olsen's claim, the Court quoted extensively from the DEA's Final Order which noted substantial differences between the two practices at issue:

> The actual abuse and availability of marijuana in the United States is many times more pervasive . . . than that of peyote . . . .The amount of peyote seized by and analyzed by the DEA between 1980 and 1987 was 19.4 pounds. The amount of marijuana seized and analyzed by the DEA between 1980 and 1987 was 15,302,468.7 pounds. This overwhelming difference explains why an accommodation can be made for a religious organization which uses peyote in circumscribed ceremonies, and not for a religion which espouses continual use of marijuana.

Id. (quoting DEA Final Order of July 19, 1988). The court continued:

> The peyote exemption is accorded to the Native American Church for a traditional, precisely circumscribed ritual. In that ritual, the peyote itself is an object of worship; for members of the Native American Church, use of peyote outside the ritual is sacrilegious. See *People v. Woody*, 61 Cal.2d 716, 394 P.2d 813, 817 (1964). Thus the church, for all purposes other than the special, stylized ceremony, reinforced the state's prohibition. In contrast, the Ethiopian Zion Coptic Church, as earlier observed, teaches that marijuana is properly smoked 'continually all day' . . . . *State v. Olsen*, 315 N.W.2d at 7 . . . .

Olsen, slip op. at 13-14. In Texas, recent licensed sales figures for the drug show no historical increase in consumption of peyote among exempt Native American Church members (as calculated as a factor of the amount purchased), and show precise accounting for all *legal* transactions taking place without incident over several years. Appendix A, *infra*.

In the present case the experience of 23 states and of the federal government demonstrates that exempting religious use of peyote does not threaten the general law enforcement interest asserted by Oregon. Because the State comes forward with only speculation as to some future harm, and the actual evidence available shows no harm to that interest, the Court should affirm the decision of the Oregon Supreme Court that such use must be accommodated.

IV.

THE FREE EXERCISE CLAUSE REQUIRES SPECIAL ACCOMMODATION FOR THE RESPONDENTS' RELIGIOUS PRACTICE TO ENSURE EQUAL TREATMENT AND PREVENT INADVERTENT PROHIBITION

The First Amendment to the Constitution exists to protect minority views, beliefs, and to some extent, practices.

> We must not forget that in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles. *There can be no assumption that today's majority is "right" and the Amish and others like them are "wrong." A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.*

Yoder, 406 U.S. at 223-24 (emphasis added). *See also Everson v. Board of Education of Ewing, Tp.*, 330 U.S. 1, 12 (1947).

The majority rarely requires protection by the courts. *See Sherbert*, 374 U.S. at 406; *Braunfeld v. Brown*, 366 U.S. 599 (1961) (Sunday closing laws); *See Lynch v. Donnelly*, 465 U.S. 668 (1984) (creches). *See also County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 57 U.S.L.W. 5045 (U.S. June 27, 1989). Minority faiths, on the other hand, are in grave danger of infringement without special protection under the Free Exercise Clause.[31]

If the Free Exercise Clause required complete neutrality of treatment among all religions, the Old Order Amish and other minority Christian beliefs would have been subject to outright prohibition by otherwise neutral state laws. This Court, however, recognizes that the Free Exercise Clause provides for accommodation of minority faiths even if it involves special treatment or accommodation of practices not followed by the majority faiths in this country. The Court must acknowledge its protection of the Native American Church's central ceremony if the Free Exercise Clause is to continue to have meaning for members of minority religions. The State's conflict with respondents is based on the generalized majority view that use of peyote is dangerous in all circumstances. Brief for Petitioners at 21-22. In other times the majority believed that other drugs, such as alcohol, were inimical to public health and welfare. Even when it did, however, as during Prohibition, the large Catholic minority ensured protection of sacramental use of wine by statute. *See, e.g.*, National Prohibition Act of 1919, c.85, Title II, § 3, 41 Stat. 308 (1919) (repealed 1935). Religious use of peyote by the Native American Church is entitled to protection in the absence of proof of the contrary.

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[31] *E.g., Frazee v. Illinois Dept. of Employment* 109 S.Ct. at 15; *Wisconsin v. Yoder*, 406 U.S. 205.

Petitioners argue that because it cannot accommodate religious practices regarding marijuana and other substances, the Free Exercise Clause also does not require accommodation of respondents' religious use of peyote. Brief for Petitioners at 17-36. *Yoder* and its progeny demonstrate the invalidity of this notion.[32]

The Native American Church shares the strong historic practice circumstances of the Old Order Amish. Originally, Native American Church members practiced their religion in traditional tribal homelands. A combination of factors increased friction between Church members and the greater society, beginning with the use of non-Indian agents and missionaries to run reservations in the early 1900's. W. LaBarre, *The Peyote Cult* 29,224 (4th ed. 1975). The federal Indian relocation program of the 1950's moved many reservation Indians into urban areas. Because of these changes Church members began experiencing prosecution efforts like those in *People v. Woody*, 61 Cal.2d 716, 40 Cal Rptr 69, 394 P.2d 813 (1964).

Similarly, the majority tolerated the Amish lifestyle until the demands of the urban, technological life of the 20th Century led to increased schooling requirements. *See, Yoder*, 406 U.S. at 217. If the Free Exercise Clause does not also provide protection to respondents' minority faith

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[32] *See, e.g., Fellowship Baptist Church v. Bertrum*, 815 F.2d 485 (8th Cir. 1987); *Duro v. District Attorney, 2d Judicial District of North Carolina*, 712 F.2d 96 (4th Cir. 1983), *cert. denied*, 465 U.S. 2006 (1983).

as it does to majority religions, respondents, like the Amish, "must either abandon belief and be assimilated into society at large or be forced to migrate into some other and more tolerant region." *Id.* at 218.[33]

The Native American Church may be unique in terms of the State's ability to accommodate its members' peyote use. Certainly, petitioners present no evidence of or argument for peyote abuse in Oregon. Petitioners' perceived inability to accommodate other religions' substance use does not overcome the special accommodation possible for respondents' carefully circumscribed practice under the Free Exercise Clause. *See Olsen v. Drug Enforcement Admin.*, No. 86-1442 and No. 86-5455, slip op. (D.C. Cir., June 20, 1986).

V.

THE WRITS SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED

A. The Criminality Of Respondents Conduct Cannot Distinguish This Case From *Sherbert et al* Because The Criminality Of Their Conduct Cannot Be Determined As A Matter Of Oregon Law Based Upon The Record Before The Court

In *Smith I*, the Oregon Supreme Court held that the legality of ingesting peyote did not affect its analysis of the state's interest because the state's interest in denying unemployment benefits must be found in the state's unemployment compensation statutes. 301 Or. 209, 220, 721 P.2d 445, 450 (1986). The Oregon Court in *Smith II* reaffirmed its holding in *Smith I* that as a matter of state law the state's interest in Oregon's unemployment compensation statutes was a financial one and that it was immaterial to Oregon's unemployment compensation law whether Smith and Black's conduct violated some other law. 307 Or. 68, 71-72, 763 P.2d 146, 147 (1988). The Court refused to decide criminality in the absence of criminal prosecution of respondents and because the unemployment process is the incorrect forum to address such issues. *See* Sec. II, B, *supra*.

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[33] Under petitioners' arguments, respondents would not even be free to practice their religion on Indian reservations in Oregon, since most reservations in Oregon are subject to Public Law 280, under which the state has criminal jurisdiction over individual Indians. *See* 18 U.S.C. § 1162(a).

B. The Question Of Whether Or Not Respondents Engaged In Criminal Conduct Which The State Can Use To Deny Them Unemployment Compensation Is Not Ripe For Review Since There Has Been No Criminal Prosecution

This Court has long recognized that the basic rationale of the ripeness doctrine is to prevent the court through "premature adjudication from entangling themselves in abstract arguments . . . ." *Abbott Laboratories v. Gardiner*, 587 U.S. 136, 148 (1967). In *Abbott Laboratories*, the Court stated that the question of ripeness turns on consideration of two issues: 1) "The fitness of issues for judicial decision" and 2) "the hardship to the parties of withholding court consideration." *Id.* at 148. The question of fitness of issue for judicial decision recognizes the requirement that there be a live case or controversy for the court to decide. The basic rationale of the doctrine recognizes the long-standing policy of the Court of judicial restraint on constitutional issues by permitting a determination that judicial resolution of an issue shall be made at a later date, if at all.

Petitioners request this Court to decide that the religious use of peyote is criminal as a matter of Oregon constitutional law and to hold that the state can disqualify respondents from unemployment compensation benefits. The Oregon Supreme Court, however, has properly refused to reach precisely this issue in the absence of an actual criminal prosecution of respondents or other members of the Native American Church. *See* Sec. I, B, *supra*.

The record of this case is devoid of any evidence that the State has prosecuted Smith, Black or any other member of the Native American Church for ingestion of peyote during religious ceremonies. Neither this Court nor the Oregon Supreme Court can make a decision on the criminality of Smith and Black's ingestion of peyote under Oregon law based upon the record in this case. As discussed earlier, proscription of peyote by statute is only one element of a determination of criminality under state law. *See* Sec. I, B, *supra*. The Court should defer decision of the issue until a criminal prosecution of a member of the Native American Church for ingesting peyote during a religious ceremony has occurred. Until the State actually prosecutes a member of the Native American Church, there can be no decision on the issue of the criminality of ingestion of peyote for sincerely held religious beliefs under Oregon law.

The second factor of ripeness identified by *Abbott Laboratories* is the hardship to the parties of withholding decision. Smith and Black certainly will suffer minimal hardship if the Court were to withhold decision. They have received their unemployment benefits after the Oregon Court's decision in *Smith II*, and these benefits cannot now be recovered by the State even if this Court rules against them. Since the State is not prosecuting respondents or others for religious use of peyote, it will suffer no hardship if its prosecution of such matters cannot go forward.[34] Given the current record of this case, the parties will not suffer hardship if this Court refuses to decide the issue appellants urge it to consider.

C. The Present Case Is Moot And Will Not Be Affected By A Decision Of This Court

In the present case, respondents have exhausted the unemployment benefits received as a result of the Oregon Supreme Court's decision in *Smith I*. Under Oregon law, respondents cannot be forced to repay the benefits received even if the Oregon Court's decision in *Smith II* is reversed. The time period has also passed in which to charge respondents with violating Oregon's drug proscription laws. Therefore the present case is moot and a decision by this Court reversing the Oregon Supreme Court will have no effect on either party. Under its previous decisions, this Court should decline to award petitioners the relief which they seek. *See, Indiana Employment* Security Div. v. Burney, 409 U.S. 540 (1972); *County of L.A. v. Davis*, 440 U.S. 625 (1979).

This Court should refuse to decide whether the possible criminality of respondents' conduct should be a basis for denying unemployment benefits to respondents until such time as the petitioners have brought criminal charges against a member of the Native American Church and the Oregon Supreme Court has decided the state constitutional issues. The burden of making this issue ripe for review rests on petitioners, not the Court. As Justice Brennan stated in his dissent in *Employment Div.*, "Inevitably each term, this Court discovers only after painstaking briefing and oral argument that some cases do not squarely present the issues that the Court sought to resolve. There is always the temptation to trivialize the defect and decide the novel case we *thought* we had undertaken rather than the virtual clone of precedent that we *actually* undertook." 108 S.Ct. at 1455 (emphasis in original) (Brennan, J., dissenting).

The Court should dismiss this case because the issue is not ripe for review.

VI.

EXEMPTING THE RELIGIOUS USE OF PEYOTE BY MEMBERS OF THE NATIVE AMERICAN CHURCH DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE UNITED STATES CONSTITUTION AND IS CONSISTENT WITH CONGRESSIONAL AUTHORITY OVER INDIAN AFFAIRS

Petitioners raise Establishment Clause issues in their brief for the first time, although these issues are not pressed with much vigor. Brief for Petitioners at pp. 18, 32. These claims have been raised before in the Free Exercise cases brought before this Court and uniformly rejected. *See, e.g.*, *Sherbert*, 374 U.S. at 409-10; *Thomas*, 450 U.S. at 719-20; *Yoder*, 406 U.S. at 220-21; *Hobbie*, 480 U.S. at 144-45. "Government efforts to accommodate religion are permissible when they remove burdens on the free exercise of religion." *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 57 U.S.L.W. at 5052, n. 51 (citation omitted).

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[34] There is no danger of improper use of peyote by respondents and their Church, since the uncontroverted evidence is that use of peyote by members of the Church outside the religious ceremony is sacrilegious. *See* Section III, *supra*.

Oregon law is consistent with this principle in providing for exemptions from otherwise valid regulatory laws for the sacramental use of wine. *See, e.g.*, ORS 471.335; 471.405(2); 471.430. While these exemptions do not specifically name all Christian denominations which use wine, they are directed at one faith. An exemption for peyote use is indistinguishable in theory from these exemptions.

Federal plenary authority over Indian affairs dictates that congressional exemption of the religious use of peyote preempts conflicting state legislation on the subject. Congress from an early date regulated the trade in potentially dangerous drugs such as alcohol for Indians. *See, Rice v. Rehner*, 463 U.S. 713 (1983). Federal regulation of this trade "must be characterized as 'one of the most comprehensive federal activities in Indian affairs'. . . ." *Id.* at 722. Congress exempted from its general prohibition sale and possession of alcohol for "sacramental" uses from the general prohibition. *See* 18 U.S.C. §§ 1154, 1155, and 1156. Congress reaffirmed this regulation in 1953, *see* 18 U.S.C. § 1161, maintaining the sacramental exemption.

Congress considered and rejected prohibiting trade in peyote with and among Indians on several occasions.[35] Relatively recent congressional treatment of the subject demonstrates a continued intent to protect the Native American Church's ceremonial use of peyote. *See* Indian Alcohol & Substance Abuse Prevention and Treatment Act of 1986, 25 U.S.C. § 2401, *et seq.* American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996; *Native American Church of New York v. United States*, 468 F. Supp. 1247 (S.D.N.Y. 1979). This is reflected in the exception to Schedule I of the Controlled Substance Act, 21 U.S.C. § 817(c) for this use of peyote.[36] 21 C.F.R. § 1307.31.

Because of this federal involvement, the State of Oregon lacks authority to prohibit possession of peyote for religious use among Native American Church members within its jurisdiction.

◆

CONCLUSION

The decision of the Oregon Supreme Court, that as a matter of state law the criminality of the religious use of peyote in Oregon is irrelevant to a determination of eligibility for unemployment benefits, and that therefore the present case is indistinguishable from prior decisions of this Court such as *Sherbert, Thomas, Hobbie,* and *Frazee,* should be affirmed. If this Court addresses the criminality of peyote use in Oregon, it should decide that the criminality of the religious use of peyote in Oregon has not been determined as a matter of Oregon law, and that Oregon has failed to present competent evidence to show that such use cannot be accommodated consistent with the State's law enforcement interests.

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[35] Congress rejected anti-peyote legislation in 1916, 1917, 1918, 1919, 1921, 1922, 1923, 1924, 1926 and 1937. *See* Stewart, Omer C., *Peyote Religion; A History*, pp. 217-21. (University of Oklahoma Press, Norman 1987).

[36] Congress also sanctions the importation of peyote for lawful uses including the Native American Church's ceremonial use. *See* 21 U.S.C. § 952.

DATED this 14th day of July, 1989.

Respectfully submitted,

CRAIG J. DORSAY
Director, Native American
Program, Oregon Legal Services
Counsel for Respondents

APPENDIX A

DEFENDANT'S EXHIBIT 9

TOTALS OF LEGAL PEYOTE SALES BY QUARTER

YEAR:	QTR:	MONTHS:	BUTTONS SOLD:	* SACKS SOLD:	ACTUAL TOTALS:
1982	4	OCT/NOV/DEC	369,810	N/A	369,810
1983	1	JAN/FEB/MAR	531,991	N/A	531,991
1983	2	APR/MAY/JUN	421,719	N/A	421,719
1983	3	JUL/AUG/SEP	155,830	N/A	155,830
1983	4	OCT/NOV/DEC	293,741	N/A	293,741
1984	1	JAN/FEB/MAR	496,116	N/A	496,116
1984	2	APR/MAY/JUN	446,065	N/A	446,065
1984	3	JUL/AUG/SEP	292,163	N/A	292,163
1984	4	OCT/NOV/DEC	441,122	N/A	441,122
1985	1	JAN/FEB/MAR	544,825	N/A	544,825
1985	2	APR/MAY/JUN	452,198	N/A	452,198
1985	3	JUL/AUG/SEP	183,658	N/A	183,658
1985	4	OCT/NOV/DEC	380,143	N/A	380,143

* 1 Sack = 1,200 Buttons

YEAR:	QTR:	MONTHS:	BUTTONS SOLD:	* SACKS SOLD:	ACTUAL TOTALS:
1986	1	JAN/FEB/MAR	710,904	26.5	741,984
1986	2	APR/MAY/JUN	501,645	12	516,045

TOTALS OF LEGAL PEYOTE SALES BY YEAR

YEAR:	GRAND TOTAL:
1982	369,810[1]
1983	1,403,281
1984	1,675,466
1985	1,560,824
1986	1,258,029[2]

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[1] Fourth Quarter Only

[2] First and Second Only

GRAND TOTAL FOR REPORTING PERIOD:

6,267,410 PEYOTE BUTTONS LEGALLY SOLD

APPENDIX B

[Seal]

TEXAS DRUG LAWS

INCLUDING
RULES RELATING TO
THE CONTROLLED SUBSTANCES ACT

AND

SCHEDULE OF PENALTIES

RELATING TO CONTROLLED SUBSTANCES

Texas Department of Public Safety
Criminal Law Enforcement Division
Narcotics Service
Austin, Texas
1987-1988

Sec. 4.11. EXEMPTIONS. (a) The provisions of this Act relating to the possession and distribution of peyote shall not apply to the use of peyote by members of the Native American Church in bona fida religious ceremonies of the church. However, persons who supply the substance to the church are required to register and maintain appropriate records of receipts and disbursements in accordance with rules promulgated by the director. The exemption granted to members of the Native American Church under this section does not apply to a member with less than 25 percent Indian blood.

(b) The provisions of this Act relating to the possession of denatured sodium pentobarbital do not apply to possession by personnel of a humane society or an animal control agency for the purpose of destroying injured, sick, homeless, or unwanted animals if the humane society or animal control agency is registered with the drug enforcement administration. The provisions of this Act relating to the distribution of denatured sodium pentobarbital do not apply to a person registered as required by Section 3.01 of this Act, as amended, distributing the substance for that purpose to a humane society or an animal control agency registered with the drug enforcement administration.

* * *

§13.23 Minimum Security Controls for All Other Registrants.

(a) Establish adequate security to prevent unauthorized access to controlled substances.

(b) Establish adequate security to prevent the diversion of controlled substances.

(c) During the course of business activities, do not allow any individual access to controlled substances storage areas except those authorized agents required for efficient operations.

(d) Controlled substances listed in Schedules I, II, III, IV, and V shall be stored in a securely locked, substantially constructed cabinet or security cabinet.

(e) "Substantially constructed cabinet" means:

(1) A structure of wood or metal so constructed as to resist easy entry by simple tools of attack such as screw drivers, crow bars, tire tools, pry bars, etc. Hinges should not be mounted with bolts or screws on outside of door and the locking devices should be installed internally as in a dead bolt type or the device should be of a

type that has protected mounting screws or bolts to inhibit removal. The cabinet should be permanently constructed or attached to the building structure or fixtures so as to prevent the cabinet from being physically removed from the premises. If the cabinet is a metal file cabinet type, it should be permanently attached to prevent easy removal and have an external locking bar that secures the drawer or drawers.

(2) Substantially constructed security cabinet means a security cabinet or safe equivalent in construction to a Class 6 Mosler Government Sales Security filing cabinet or a Class 5 Mosler Government Sales safe.

(3) A cabinet less substantially constructed may meet security requirements provided the cabinet is located in a room or area, entrance to which has been so constructed that hinge mountings inhibit removal and a limited number of employees have keys or combinations to locking device. If combination locks are utilized, the combination can be changed upon termination of employees having knowledge of the combination.

* * *

§13.26 Other Security Controls.

(a) A registrant shall not employ in any manner an individual that would have access to controlled substances who has:

(1) had a federal or state application for controlled substances registration denied or revoked;

(2) been convicted of a felony offense under any state or federal law relating to controlled substances or been convicted of any other felony; or

(3) been a licensee of a health regulatory agency whose license has been revoked, cancelled, or suspended.

(b) The Director may allow a registrant to employ an individual who has violated any provisions of Subsection (a) of this section after due consideration of such application of the registrant, but in no event shall the individual be allowed employment by a registrant during the five-year period immediately following his conviction for a felony offense under state or federal law, or until the terms of a sentence are satisfied whichever is the longer period of time. The Director may consider all relevant factors, including, but not limited to the following, in making his decision concerning the employment of such individual:

(1) If a convicted felon, the suspension of sentence and placement of the individual on probation;

(2) If a convicted felon, the successful completion by the individual of any court-ordered supervision;

(3) If the previously revoked, cancelled, or suspended license of such individual has been reinstated or reissued by a health regulatory agency; and

(4) If the employment of such individual by a registrant is in the best interest of the public and of the individual.

(c) To comply with Subsection (a) of this section, a registrant should, at a minimum, conduct the following employment background checks or inquiries;

(1) If applicant is a registrant, inquiry should be made of the appropriate state health regulatory agency as to the status of the registrant's license with that agency.

(2) Local inquiry by name, date and place of birth, and other identifying information to local courts and law enforcement agencies for records of pending charges and convictions. Local practice may require such inquiries to be made in person, rather than by mail, and a copy of an authorization from the employee may be required by certain law enforcement agencies.

(3) If applicant is a nonregistrant, local inquiry should be made as in paragraph (2) of this subsection.

(d) Before distributing a controlled substance to any person who the registrant does not know to be registered to possess the controlled substances, the registrant shall make a good faith inquiry, either with the Drug Enforcement Administration or with the Controlled Substances Registration Section of the Texas Department of Public Safety to determine that the person is registered to possess the controlled substance.

(e) An order form may be executed only on behalf of the registrant named thereon and only if his registration as to the substances being purchased has not expired or been revoked or suspended.

(f) Registrants shall notify the Narcotics Service of the Texas Department of Public Safety in writing of the theft or significant loss of any controlled substances upon discovery of such theft or loss. The notification of such theft or loss may be reported on the Texas Department of Public Safety form NAR-91, Report of Theft or Loss of

Controlled Substances, or by submitting a duplicate of the Drug Enforcement Administration Form 106, Report of Theft or Loss of Controlled Substances, or by submitting a list of all controlled substances stolen or lost.

§13.27 Inspections.

(a) The Texas Department of Public Safety shall inspect the controlled premises and records of applicants and registrants pursuant to the Texas Controlled Substances Act, Subchapter 3, Section 3.01, paragraphs (c) and (d).

(b) As used in this section, the term "controlled premises" means:

(1) Places where original or other records or documents required under the Texas Controlled Substances Act are kept or required to be kept; and

(2) Places, including factories, warehouses, or other establishments, and conveyances, where persons registered under the Texas Controlled Substances Act may lawfully hold, manufacture, analyze, distribute, dispense, administer, possess, or otherwise dispose of controlled substances.

(c) For the purpose of inspecting, copying, and verifying the correctness of records, reports, or other documents required to be kept or made and otherwise facilitating the carrying out of his functions under the Texas Controlled Substances Act, the director or his designee is authorized to enter controlled premises and to conduct inspections thereof, and of the things specified relevant to those functions.

(d) An officer or employee of the director shall have the right to:

(1) inspect and copy records, reports, and other documents required to be kept or made under the Texas Controlled Substances Act;

(2) inspect, within reasonable limits and in a reasonable manner, security of controlled premises and all pertinent equipment, finished and unfinished drugs, and other substances or materials, containers, and labeling found therein, and except as provided in subsections (e) and (f) of this section, all other things therein, including records, files, papers, processes, controls, and facilities appropriate for verification of the records, reports, and documents required to be kept under the Texas Controlled Substances Act or otherwise bearing on the provisions of the Texas Controlled Substances Act;

(3) examine an inventory-any stock of any controlled substances therein and obtain samples of any such substance; and

(4) examine any hypodermic syringe, needle, pipe, or other instrument, device, or contrivance, equipment, control, container, label, or facility relating to possible violation of the Texas Controlled Substances Act, or any material used, to be used, or capable of use in diluting or adulterating a controlled substance.

(e) Except when the owner, operator, or agent in charge of the controlled premises consents in writing, no inspection authorized by this section shall extend to:

(1) financial data,

(2) sales data other than shipment data, or

(3) pricing data.

(f) Except as provided in subsection (a) of §3.08 or subsection (c) of §3.09 of this Act, a practitioner engaged in authorized medical practice or research may not be required on compelled to furnish the name or identity of a patient or research subject to the Texas Department of Public Safety, the director of the State Program on Drug Abuse, or to any other agency, public official, or law enforcement officer, and a practitioner may not be compelled in any state or local civil, criminal, administrative, legislative, or other proceeding to furnish the name or identity of an individual that the practitioner is obligated to keep confidential. The confidentiality of the patient records shall be respected provided the practitioner maintains separate records relating to controlled substances respective to the Texas Controlled Substances Act.

* * *

§13.35 Persons Required to Register.

Every person who sells peyote to members of the Native American Church with not less than 25% Indian blood for bona fide religious ceremonies shall make application for registration under the Texas Controlled Substances Act and obtain an annual registration from the Texas Department of Public Safety. This registration will be issued by the Texas Department of Public Safety to expire on July 1 of each year.

(1) A registration certificate cannot be issued to a peyote distributor unless:

(A) applicant is registered for such purpose pursuant to the Federal Controlled Substances Act;

(B) applicant has made application for registration as a peyote distributor on form NAR-95 and paid the required registration fee; and

(C) the application for registration has been notarized and is accompanied by a notarized letter from the local chief of police, sheriff's office, or county judge stating that the applicant is of good moral character.

(2) If application for registration is approved, applicant will be issued certificate of registration, form NAR-96, and peyote distributor authorization card, form NAR-96A, by the Texas Department of Public Safety to expire on July 1 of each year.

(3) Certificate of registration, form NAR-96, shall be displayed in a conspicuous place at the address appearing on the registrant's certificate of registration.

(4) Each licensed peyote distributor shall furnish the Texas Department of Public Safety, Controlled Substances Registration Section, the names of his employees. If an employee's name has not been indicated on his application for registration, he shall advise the Department of Public Safety in writing at such time as he hires a new employee.

(5) Each licensed peyote distributor will be furnished an authorization letter and a peyote employee authorization card by the Texas Department of Public Safety, Controlled Substances Registration Section, certifying that the employee mentioned is an employee of the licensed peyote distributor and is authorized to cut and deliver peyote directly to the licensed distributor. The authorization letter shall be displayed at the location

where peyote distributor is registered which should be the address appearing on the certificate of registration. The peyote employee authorization card must be in possession of employee of licensed peyote distributor at all times.

(6) When an employee ceases employment with a licensed peyote distributor, the licensed peyote distributor shall immediately return the peyote employee authorization card issued to his employee and the authorization letter to the Texas Department of Public Safety, Controlled Substances Registration Section, for cancellation.

(7) If licensed peyote distributor's certificate is revoked or suspended, peyote distributor shall return the following directly to the Texas Department of Public Safety for cancellation:

(A) all peyote employee authorization cards;

(B) authorization letters issued to employees;

(C) peyote distributor certificate of registration;

(D) peyote distributor authorization cards; and

(E) all sales of peyote books and receipts for sale of peyote not already submitted to office.

§13.36 Requirements for Selling Peyote to Authorized Individual.

(a) A licensed peyote distributor cannot sell peyote to an individual unless such individual meets the following requirements.

(1) Such individual is a member of the Native American Church with not less than 25% Indian blood and the peyote purchased is to be used for bona fide religious ceremonies.

(2) Such individual is a licensed peyote distributor licensed by the Texas Department of Public Safety, Controlled Substances Registration Section.

(b) Before a licensed peyote distributor can sell peyote to a member of the Native American Church with not less than 25% Indian blood, one of the following two methods must be followed.

(1) The individual purchasing or handling peyote for the Native American Church to be used in bona fide religious ceremonies shall furnish a certificate of authorization made out in the name of the individual who is actually purchasing or harvesting peyote. The certificate of authorization shall be on official stationery and shall contain the following:

(A) name of individual purchasing or harvesting peyote;

(B) date issued and date certificate of authorization expires;

and

(C) signature of custodian or president of the Native American Church (local organization).

(2) If a certificate of authorization is not furnished, a licensed peyote distributor cannot sell peyote to

an individual alleging to be a member of the Native American Church unless the following information is furnished:

(A) document showing the member's tribe, degree of Indian blood, date of birth, agency enrolled with, and census number or enrollment number;

(B) letter signed by the president of the Native American Church certifying that the individual is a member in good standing of the Native American Church; and

(C) letter stating that the peyote to be purchased is to be used for bona fide religious ceremonies only.

(c) Peyote sold to members of the Native American Church or to a licensed peyote distributor must have been harvested or cut in Texas by certified employees of the licensed peyote distributor.

§13.37 Requirements for Reporting Peyote Sales.

Licensed peyote distributors shall furnish quarterly to the Texas Department of Public Safety, Controlled Substances Registration Section, a copy of all receipts issued for sale of peyote including all sales of peyote by mail order request, from NAR-96C.

(1) Receipts shall be required on or before the following dates:

(A) April 15 (for the months January, February, and March)

(B) July 15 (for the months April, May, and June)

(C) October 15 (for the months July, August, and September)

(D) January 15 (for the months October, November, and December)

(2) Receipts shall contain the following and the original only shall be submitted to the Texas Department of Public Safety, Controlled Substances Registration Section, on form NAR-96C:

(A) name of licensed peyote distributor;

(B) address of licensed peyote distributor;

(C) date of sale;

(D) name and address of member of Native American Church purchasing peyote;

(E) church affiliation (Native American Church of Navajoland, etc.);

(F) church membership number or certificate of authorization permit number and expiration date;

(G) quantity purchased (number of buttons sold);

(H) total cost of sale; and

(I) signature of member of Native American Church who purchased peyote, except in cases of mail order requests.

(3) Licensed peyote distributor shall furnish a copy of the receipt to member of Native American

Church at the time of the purchase, shall retain a copy for his permanent files, and shall submit the original receipt directly to the Texas Department of Public Safety, Controlled Substances Registration Section, at the time the quarterly report is submitted as specified in paragraph (1) of this section.

§13.38 Security Requirements.

Compliance with applicable provisions of Section 13.23 of this title (relating to Minimum Security Controls For All Other Registrants) and Section 13.26 of this title (relating to Other Security Controls) pertaining to the Texas Controlled Substances Act shall be deemed compliance with security requirements for licensed peyote distributors.

§13.39 Requirements for Certification.

(a) Each employee of a licensed peyote distributor will be issued a peyote employee authorization card, form NAR-96B, by the Texas Department of Public Safety, Controlled Substances Registration Section, which shall be kept in his possession at all times. The card authorizes employee to cut or harvest peyote only on the property or location shown on the registrant's application and deliver it directly to the licensed peyote distributor named on the peyote employee authorization card.

(b) An employee authorization letter will be furnished each licensed peyoted distributor indicating the individual named is an employee of the licensed peyote distributor and is authorized to cut and deliver peyote directly to the licensed peyote distributor. The employee authorization letter shall be displayed in a conspicuous place at the address appearing on the licensed peyote distributor's certificate of registration.

§13.40 Requirements for Recognition as Native American Church.

(a) In order to be recognized as a Native American Church by the Texas Department of Public Safety, the following information shall be submitted to the Texas Department of Public Safety, Controlled Substances Registration Section:

(1) charter (state) from each reservation;

(2) officers and addresses; and

(3) buying custodians from each reservation and community and addresses of buying custodians.

(b) Any changes in the above information shall be submitted immediately in writing to the Texas Department of Public Safety, Controlled Substances Registration Section.

§13.41 Requirements for Purchase of Peyote.

(a) One of the following methods shall be followed in order that a member of the Native American Church with not less than 25% Indian blood can purchase or harvest peyote in the State of Texas.

(1) A certificate of authorization shall be furnished to the licensed peyote distributor made out to the individual who is purchasing or harvesting peyote. The

certificate of authorization shall be printed on official stationery and shall contain the following:

(A) name of individual purchasing or harvesting peyote;

(B) date certificate of authorization issued and expiration date;

and

(C) signature of custodian or president of the Native American Church (local organization).

(2) A copy of each certificate of authorization issued shall be mailed to the Texas Department of Public Safety, Controlled Substances Registration Section, P. O. Box 4087, Austin, Texas 78773-0001, and in the Texas Department of Public Safety files prior to date of peyote purchase.

(b) If the method in subsection (a) of this section is not followed, the following method shall be followed in order that an individual may purchase or harvest peyote in the State of Texas.

(1) Any individual attempting to purchase or harvest peyote in the State of Texas shall furnish a document containing the following information:

(A) tribe affiliation;

(B) degree of Indian blood;

(C) date of birth; and

(D) agency enrolled with the census number or enrollment number.

(2) Letter signed by the president of the Native American Church (state organization) certifying that the individual is a member in good standing of the Native American Church (state organization).

(3) Letter stating that peyote to be purchased or harvested by the individual named on the birth certificate is to be used for bona fide religious ceremonies only.

* * *

REPLY
BRIEF

No. 88-1213

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

EMPLOYMENT DIVISION,
DEPARTMENT OF HUMAN RESOURCES,
of the STATE OF OREGON,
W.E. HUNTER, Administrator,

Petitioners,

v.

ALFRED L. SMITH,
GALEN W. BLACK,
and ADAPT,

Respondents.

On Writ of Certiorari to the Supreme Court
of the State of Oregon

REPLY BRIEF FOR PETITIONERS

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42 pp

TABLE OF CONTENTS

Page

I. The Federal Question Is Properly before the Court 1

A. The Controversy Is Not Moot 1

B. The Question Presented Is Properly before the Court 2

II. The Free Exercise Clause Does Not Require Government to Compromise a Compelling Health and Safety Interest by Accommodating a Single Religion in an Area Where Many Religions Seek the Same Accommodation 6

A. Factually, NAC Peyote Use Is Not Meaningfully Distinguishable from other Religious Drug Use 8

B. Legally, NAC Peyote Use Is Not Meaningfully Distinguishable from other Religious Drug Use 15

Conclusion 20

Appendix A

Native American Population Figures App-1

Appendix B

Oregon State Board of Pharmacy Rules Hearing App-3

TABLE OF AUTHORITIES

Page

Cases Cited

Aguilar v. Felton, 473 U.S. 402 (1985) ... 16

Brown v. Board of Education, 347 U.S. 483 (1954) ... 11

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Edgar v. MITE Corp., 457 U.S. 624 (1982) ... 2

Employment Div. v. Rogue Valley Youth for Christ, 307 Or. 490, 770 P.2d 588 (1989) ... 19

Employment Division v. Smith, 485 U.S. 660, 108 S.Ct. 1444 (1988) ... 3,4

Frazee v. Employment Security Department, ___ U.S. ___, 109 S.Ct. 1514 (1989) ... 15

Gillette v. United States, 401 U.S. 437 (1971) ... 17,18

Glide Lumber Prod. v. Emp. Div., 86 Or. App. 669, 741 P.2d 907 (1987) ... 4

Harris v. Reed, ___ U.S. ___, 109 S.Ct. 1038 (1989) ... 5-6

Hernandez v. Commissioner of Internal Revenue, ___ U.S. ___, 109 S.Ct. 2136 (1989) ... 16

Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) ... 2,4

Home Telephone & Telegraph Co. v. Los Angeles, 227 U.S. 278 (1913) ... 5

Jacksonville Bulk Terminals v. Longshoremen, 457 U.S. 702 (1982) ... 2

Larson v. Valente, 456 U.S. 228 (1982) ... 18

Lyng v. Northwest Indian Cemetery Protective Assoc., 485 U.S. ___, 108 S.Ct. 1319 (1988) ... 16,17

Michigan v. Long, 463 U.S. 1032 (1983) ... 5

Page

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Sherbert v. Verner, 374 U.S. 398 (1963) 2,3,4

Smith v. Employment Div., 307 Or. 68, 763 P.2d 146 (1988) 2,5,7

State v. Kennedy, 295 Or. 260, 666 P.2d 1316 (1983) 3

Thomas v. Review Board, 450 U.S. 707 (1981) 2,4 15,16

United States v. Allegheny County, 322 U.S. 174 (1944) 20

United States v. Lee, 455 U.S. 252 (1982) 15,17

Wisconsin v. Yoder, 406 U.S. 205 (1972) 16,17 18

Statutory Provisions

Or. Rev. Stat. § 657.176(4) (1987) 1

Or. Rev. Stat. § 657.315(1) (1987) 1

Or. Rev. Stat. § 657.315(1)(b) and (2) (1987) 1

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Page

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REPLY BRIEF

I. The Federal Question Is Properly before the Court.

The question presented is straightforward: whether Oregon's general criminal law prohibiting peyote possession is unconstitutional as applied to persons who ingest the drug for religious reasons. Respondents insist on directing the focus away from that issue, much as they did when this case was previously before the Court. They claim that the issue is moot, premature, or not presented by this case. Their arguments are not well-taken.

A. The Controversy Is Not Moot.

Respondents argue that they have received all their unemployment benefits and that state law no longer requires them to repay those benefits. (Resp. Br. 44-45). Not only do respondents fail to cite any statute or authority to support their position, but the state statutes specifically refute their claim.

An unemployment compensation claimant remains liable for erroneously paid benefits for 52 weeks following the effective date of a *final* decision establishing that the claimant was not entitled to benefits.[1] Or. Rev. Stat. § 657.315(1) (1987). The Oregon statutes authorize the Employment Division either to recover amounts paid in excess of the maximum benefits allowable[2] or to offset the erroneous payments against any new award of benefits made during the year after the decision becomes final. Or. Rev. Stat. § 657.315(1)(b) and (2) (1987). Respondents' mootness claim has no merit. *See*

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[1] It is possible respondents misread this statute to mean that liability for repayment exists for one year after the date of the erroneous payment. Were respondents' reading correct, few unemployment compensation cases could complete the state appellate process without becoming moot.

[2] If the Employment Division's disqualification of respondents is ultimately upheld, the maximum unemployment benefits allowable will be reduced by eight times the weekly benefit amount. Or. Rev. Stat. § 657.176(4) (1987).

Jacksonville Bulk Terminals v. Longshoremen, 457 U.S. 702, 704 n.1 (1982); *Edgar v. MITE Corp.*, 457 U.S. 624, 630 (1982).

B. The Question Presented Is Properly before the Court.

Respondents and *amici*[3] focus on the Oregon Supreme Court's statement on remand that "it was immaterial to Oregon's unemployment compensation law whether the use of peyote violated some other law," *Smith v. Employment Division*, 307 Or. 68, 71, 763 P.2d 146, 147 (1988) (per curiam). (Resp. Br. 5-9; ACLU Am. Br. 22-27). Treating the statement as a "reaffirmation" of the state supreme court's prior holding, respondents and *amici* argue that certiorari should be dismissed as improvidently granted because it is now clear the State's interests here are no different from the States' interests in *Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Review Board*, 450 U.S. 707 (1981); and *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987). (Resp. Br. 17-20, 40-41; ACLU Am. Br. 29).

Respondents and *amici* read more into the Oregon Supreme Court's statement than its words or context warrants. The remark occurs as part of an explanation of the prior history of the case. *Smith v. Employment Division*, *supra*, 307 Or. at 71-72. It is phrased in the past tense and merely summarizes what the state court previously had said. *Ibid.* Contrary to respondents' arguments, the Oregon Supreme Court did not regard this as an issue on remand, nor did it "reaffirm" its prior holding. Rather, the court correctly recognized that the only question on remand was whether the "state has validly criminalized certain types of religiously motivated conduct." *Id.*, at 72.

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[3] *Amici* are the American Civil Liberties Union (ACLU Am. Br.), the Association of American Indian Affairs (AAIA Am. Br.), the American Jewish Congress and the Council on Religious Freedom.

The statement on which respondents focus identifies no new controlling principle of state law. This Court previously recognized that "as a matter of state law, the commission of an illegal act is not itself a ground for disqualifying a discharged employee from benefits." *Employment Division v. Smith*, 485 U.S. 660, 108 S.Ct. 1444, 1450 (1988). It held, however, that the "illegality of respondents' conduct is relevant to the constitutional analysis." *Id.*, 108 S.Ct. at 1446. The Court remanded solely because it appeared unclear whether the Oregon statutes prohibited use of peyote as opposed to possession.[4] *Id.*, at 1451-52.

This Court thus already considered the issue respondents reassert here and held that it was not dispositive. The Court's prior resolution of this issue would appear to foreclose further discussion. Respondents and *amici*, however, press their arguments further, and it is perhaps appropriate to explain briefly why this Court's holding in *Smith* follows directly from the reasoning in *Sherbert v. Verner*, *supra*.

The *Sherbert* Court undertook a three-step analysis of Ms. Sherbert's unemployment benefits claim. It began from the proposition that, "[p]lainly enough," South Carolina had no legitimate interest in preventing Ms. Sherbert from observing her Sabbath on Saturday. 374 U.S. at 403. The only questions left to be resolved were whether denying unemployment benefits to Ms. Sherbert burdened the exercise of her First Amendment rights and whether the State's interest in administering its unemployment laws justified that burden.[5]

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[4] The Court recognized that its remand also would give the Oregon courts the opportunity to address the issue under the state constitution, as is their practice. *Employment Division v. Smith*, *supra*, 108 S.Ct. at 1451-52; *see State v. Kennedy*, 295 Or. 260, 262-65, 666 P.2d 1316 (1983).

[5] Because the conduct that disqualified Ms. Sherbert from benefits was constitutionally protected activity, the only state interest that would justify burdening Ms. Sherbert's First Amendment rights had to be found, if at all, in the administration of the unemployment laws.

With the exception of this case, none of the cases coming before the Court since *Sherbert* has involved religiously motivated conduct that government had any legitimate interest in regulating. This case was the first to present the issue the Court previously passed over as "plain enough" in *Sherbert*, *Thomas*, and *Hobbie*—whether the conduct that disqualifies the employee from benefits[6] is within the State's regulatory reach. When, as here, government has prohibited certain conduct for all citizens, the government's broader regulatory interest must first be considered. If the government's regulatory interest is sufficiently weighty to justify prohibiting all citizens from engaging in the conduct, including those who do so for religious reasons, the claim to benefits falls with that recognition. A citizen cannot use a free exercise interest as a sword to claim an entitlement to unemployment benefits when the citizen has no right to engage in the conduct at all. Accordingly, as the Court held in its first decision in this case, respondents have no constitutional right to unemployment benefits if Oregon has criminalized religious peyote ingestion consistent with the Federal Constitution. The existence of a valid state statute prohibiting the conduct thus is relevant to the analysis, as a matter of *federal* law. *Employment Division v. Smith*, *supra*, 108 S.Ct. at 1451.

Respondents argue alternatively that even if the constitutionality of their peyote use is at issue, the issue is not ripe. (Resp. Br. 13). They concede that the Oregon Supreme Court held that the "Oregon statute against possession of controlled substances, which include peyote, makes no exception for the sacramental use of peyote . . . ." *Smith v. Employment Division*, *supra*, 307 Or. at 72-73. They also recognize that the state court squarely decided the First Amendment question. *Ibid.* They argue, however, that the state court's failure to address the issue under the Oregon Constitution means that the federal question is premature.

Although petitioners read the Oregon Supreme Court's decision differently from respondents,[7] it is immaterial whether the state supreme court addressed this issue under the Oregon Constitution. *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U.S. 278 (1913). In *Home Telephone*, the Court rejected the argument that federal courts could not consider whether a state statute violated the federal constitution until the statute had been tested under the analogous provision of the state constitution. *Id.*, at 283-84. To rule otherwise, the Court explained, would result in "paralysis." *Id.*, at 284. The state court's federally based decision would be insulated from change at the state level and immune from review by this Court. *See also Michigan v. Long*, 463 U.S. 1032 (1983); *Harris v. Reed*, ___U.S. ___, 109 S.Ct. 1038

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[6] Under Oregon law, an employer's no-drugs policy will be legitimate if there is some connection between drug use and job performance. *Glide Lumber Prod. v. Emp. Div.*, 86 Or. App. 669, 674, 741 P.2d 907 (1987). In this case, the employer required all its substance abuse counselors, including respondents, to remain alcohol and drug free so that they could provide appropriate role models for their clients. There is no dispute that the employer's no-drugs policy was integrally related to the jobs respondents performed and that respondents' deliberate disregard of their promise to remain drug and alcohol free ordinarily would have disqualified them from benefits.

[7] The Petition for Writ of Certiorari discusses the Oregon Supreme Court's failure to address the state constitutional issue expressly, despite full briefing and argument on the question by the parties. Pet. Cert. at 4-8. The lower court declined, in footnote three of its opinion on remand, to consider whether there might be particular circumstances in which the state constitution would bar the prosecution of a Native American Church member. That approach was consistent with footnote 17 of the Court's opinion, which emphasized that the concern on remand was "not with whether some fact unique to respondents' cases bars their prosecution, but with whether Oregon law provides a general exemption from the scope of its criminal laws for the religious use of peyote." 108 S.Ct. at 1452. Beyond that, the state court's willingness to reach the federal question must be deemed either an implicit rejection of any state constitutional claim, or a determination that the question was unnecessary to its decision. Either way, as discussed above, the state court's silence does not insulate its federal holding from the Court's review.

(1989). The federal issue in this case is ripe and properly before the Court.

II. The Free Exercise Clause Does Not Require Government to Compromise a Compelling Health and Safety Interest by Accommodating a Single Religion in an Area Where Many Religions Seek the Same Accommodation.

The parties and *amici* agree on several important points. All agree that government and the public have a vital interest in controlling the use of dangerous drugs, including hallucinogens such as peyote. All agree that, as to the public generally, government has a compelling health and safety interest in prohibiting any and all peyote use. Significantly, no one argues that all sincere, bona fide religious use of hallucinogens, or even peyote alone, is constitutionally exempt from the reach of state and federal drug regulations. Respondents and *amici* argue only that the Free Exercise Clause protects the religious use of one drug (peyote) by members of one group (the Native American Church). The central disagreement thus narrows to this: may or must government carve out a denomination-specific exemption in an area where many denominations clamor for the same accommodation? In the area of religious drug use, we perceive no neutral principles on which government can craft an exemption for one church or religion but not for others.

Our disagreement rests in part with the factual predicates to respondents' and *amici*'s arguments. For example, in an attempt to minimize the impact of exempting religious peyote use from Oregon's uniform controlled substance law, respondents rely heavily on inflated claims as to the number of states that legislatively exempt the Native American

Church ("NAC") or other religious peyote use.[8] In an attempt to magnify the burden on their religious practice, respondents inaccurately characterize Oregon as the only state with a significant Native American and NAC population that does not permit their religious use of peyote.[9] Regardless how these factual disputes are resolved, ultimately the more troubling question is respondents' claim that the government can accommodate their practices because NAC peyote use can be distinguished from all other religiously motivated drug use. Respondents have failed to demonstrate, however, either a factual or legal basis for the preferential accommodation of their church only.

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[8] The actual number of states with exemptions is closer to eleven or twelve rather than twenty-three, as respondents assert. (*E.g.*, Resp. Br. at 25, 33). They do not cite or discuss the statutes, but rely solely on a footnote to the Oregon Surpeme Court's decision on remand. *Smith v. Employment Div.*, 307 Or. 68, 763 P.2d 146 (1988). The state court in that footnote noted that twelve states, in addition to those expressly exempting peyote, "link" their exemptions to federal law. The lower court's characterization of those laws was not accurate, however. With the exception of the Alaska statute, the statutes cited by the court do not adopt the federal "exemptions." They provide only that the state "schedules" shall be the same as the federal schedules, unless changed by state law. These statutes mean only that the federal government's decision to place peyote on Schedule I causes peyote to be on the state Schedule I as well. The federal Drug Enforcement Administration's decision to exempt NAC members from the consequences of that scheduling choice is a wholly separate matter and is not addressed by those provisions.

[9] Oregon hardly qualifies as a state with one of the nation's leading Native American or NAC populations. In fact, Oregon ranks only fourteenth in the nation in terms of its Native American population, with only about two percent of the nation's total. (App. A). Apparently no more than about 100 people in Oregon are NAC members. (App. B at App. 8). Based on estimates of 100,000 to 300,000 NAC members nationwide, Oregon NAC members represent at most one tenth of one percent of that total.

Respondents are equally wrong when they claim that no state with a significant concentration of Native Americans or NAC members has declined to exempt the NAC's peyote practices from its criminal laws. More than half of the nation's 1.5 million Native Americans live in six states (California, Oklahoma, Arizona, New Mexico, North Carolina and Washington). (App. A). Of those states, only Arizona and New Mexico legislatively exempt religious peyote use from their criminal laws. Oklahoma's status as a non-exempting state is particularly significant. It has the second highest Native American population (App. A), and both the Native American peyotism movement and the NAC originated there. *See generally* O. STEWART, PEYOTE RELIGION 45-67, 220-26 (1987).

A. Factually, NAC Peyote Use Is Not Meaningfully Distinguishable from other Religious Drug Use.

The lynchpin of respondents' claim to a denomination-specific exemption is that the "practices, beliefs and history of the Native American Church are so unique and well-defined that it is unlikely that they will be duplicated by any other religious group." (Resp. Br. 31). Because many other drug-based religions may also assert that their practices are unique, respondents' argument necessarily rests on the implicit assumption that their religion is genuine, but that all other religions which profess a belief in drug use somehow are not. In actuality, NAC doctrine and history are not so distinctive as to compel First Amendment protection for this religion, and this religion alone.

1. Neither peyotists generally nor NAC members in particular can legitimately make any exclusive claim to a tradition of ritualized and religious drug use. In fact, the religious use of hallucinogens and other drugs has deep historical roots in nearly all parts of the world.[10] Typically, early hunting and gathering cultures learned the properties of all plants that grew where they lived, including plants that alter human consciousness.[11] Just as commonly, the altered states of con-

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[10] Scholarly literature abounds respecting the ritual and religious use of drugs in various ancient and modern cultures throughout the world. *See, e.g.*, R. Schultes & A. Hofmann, Plants of the Gods, Origins of Hallucinogenic Use (1979) ("Schultes/Hofmann"); L. Grinspoon & J. Bakalar, Psychedelic Drugs Reconsidered (1979) ("Grinspoon-/Bakalar"); Drugs, Rituals and Altered States of Consciousness (du Toit ed. 1977) ("du Toit"); Flesh of the Gods, the Ritual Use of Hallucinogens (Furst ed. 1972); M. Harner, Hallucinogens and Shamanism (1973); Lyttle, *Drug Based Religions and Contemporary Drug Taking*, 18 J. of Drug Issues, 271-84 (Sp. 1988) ("Lyttle"); Bakalar, *Social and Intellectual Attitudes Toward Drug-Induced Religious Experience*, 25 J. of Humanistic Psychology 45-66 (Fall 1985).

[11] Stewart, *supra* at 17. *See generally* Schultes/Hofmann, *supra* at

(Footnote continued on next page)

sciousness these plants produce were integrated into systems of sacred beliefs and ritualization.[12] As a result,

> drug-inspired religious worship has undoubtedly been a part (albeit a sometimes hidden or suppressed part) of human spiritual experience for thousands of years. The 2,000 year-old-Aztec sacred mushroom referred to as "God's Flesh"; the Soma of the Hindu's; the Haoma (hemp) of the Zoroastrians; the Benzoin of Southeast Asia; the Pituri of the Australian Aborigini; the Eleusuan of Kykeon; Zen's fifth cup of tea which purifies, and whose sixth "calls to the realm of the immortals"; all only begin a list of more well-known sacramental examples.

Lyttle, *Drug Based Religions and Contemporary Drug Taking*, 18 J. of Drug Issues 271 (Sp. 1988).

There is no evidence of any extensive, indigenous use of peyote by Native Americans. Instead, peyote and its long tradition of religious use are primarily traceable to Mexico, where peyote and other psychoactive plants grow in abundance and have long been integrated into religious beliefs.[13] Although

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(Footnote continued from previous page)

26-30 (describing the geographic and botanical range of naturally occurring hallucinogens throughout the world, and their discovery and use by indigenous populations).

[12] The "universal human phenomena" of altered states of consciousness and their ritualization and rationalization are discussed in Erika Bourguignon's essay *Altered States of Consciousness, Myths, and Rituals*, which is one of many related articles in Drugs, Rituals and Altered States of Consciousness (du Toit ed. 1977). Bourguignon studied 488 societies from all over the world, and found that altered states of consciousness were institutionalized in a religious framework in over ninty percent of them. *Id.* at 9.

[13] For a general description of the historic use of peyote as part of cultural and religious practices originating in Mexico, *see generally* D. Aberle, The Peyote Religion Among the Navaho 17 (1966) ("Aberle"); Stewart *supra* at 17-59; E. Anderson, Peyote, The Divine Cactus 1-17 (1980) ("Anderson"). Other cactus species (also containing mescaline), mushrooms (containing psilocybin), Morning Glory seeds, *datura*, and similar hallucinogens all have acquired religious significance in Mexican Indian culture. *See, e.g.*, Schultes/Hofmann, *supra* at 27; W. La Barre, The Peyote Cult 131-37 (1964) ("La Barre"); R. Schultes, *The Botanical and Chemical Distribution of Hallucinogens* in Drugs, Rituals and Altered States of Consciousness 25-44 (du Toit ed. 1977).

experts disagree on precisely how the Peyotist religion spread to the United States, they agree generally that Peyotism as it is now practiced by Native Americans originated on reservations in Oklahoma in the late 1880's.[14]

The peyote religion was, and to a degree remains, controversial among tribes in the United States because it was "new" and foreign, and it tended to undercut Native American traditions and customs.[15] At most, only ten to twenty percent of all Native Americans have joined the NAC.[16] An uncertain number of Native Americans also are Peyotists but do not belong to that particular church.[17] Without question, however, the religion has spread. In the best traditions of this nation's many religious creeds and its citizens' freedom to adopt whatever religious beliefs their consciences dictate, a minority of Native Americans have embraced a religion that originated in another culture and another country. In this respect, NAC members are no different from other individuals who convert to religions that profess beliefs in drug use. Neither they nor any other one church or creed can lay claim to an exclusive right to government accommodation of their sincere religious drug use.

2. The second prong to respondents' claim for unique denominational protection is that their drug ingestion practices are so well-defined that only NAC religious peyote use does not compromise government's compelling interest in prohibiting dangerous drugs. Their argument assumes that their drug use, and not that of any other religion, is responsible and beyond abuse, and that government can have confidence in that fact both now and in the future.

In actuality, however, what government knows or can know about private religious drug use is highly uncertain. Sweeping claims that NAC peyote use is "carefully controlled in a manner which enhances its spiritual impact and prevents abuse" (AAIA Am. Br. at 39) cavalierly bypass fundamental concerns that must be addressed: who may ingest the drug, how much of the drug may be consumed, under what circumstances and with what frequency? There are few satisfactory or authoritative answers to these questions.

Some information about NAC practices in Oregon is available in the form of legislative facts provided by respondent Smith and others in their unsuccessful attempt to obtain an exemption in Oregon.[18] According to those representations, there are no particular requirements for membership in the church; people join by attending the ceremonies and eventually becoming recognized as members. (*Id.* at App-14). Significantly, however, people do not have to be members to participate in the ceremony. (*Id.* at App-8). Little information was provided about the ceremonies or peyote's use as a sacrament. Instead, peyote was described mostly in terms of its use to cure alcoholism and bad health. *Id.* at App-10 through App-15. Peyote is taken whenever a church member feels ill and needs peyote as a medicine. (*Id.* at App-15). This takes place on an individual basis, in the home of the person who is ill, as well as in group ceremonies. (*Id.* at App-16).

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[14] *E.g.*, Aberle *supra* at 17; Stewart, *supra* at 3, 34-61; J. Slotkin, The Peyote Religion 17-32 (1956) ("Slotkin").

[15] As a result, bitter rivalries over whether to adopt the peyote religion arose among tribal members and within families. Anderson, *supra* at 34. Some tribes, particularly the Navajo, objected to Peyotism because it had arisen outside of their particular tribe. Anderson, *supra* at 34; Aberle, *supra* at 111-13. Indeed, the Navajo eventually outlawed peyote use on Navajo reservations through an ordinance that declared it "not connected with any Navajo religious practice," "in contradiction to the traditional ceremonies of the Navajo people" and "harmful and foreign to our traditional way of life." Aberle, *supra* at 113 (Resolution No. CJ-1-40).

[16] These percentages are based on estimates of NAC membership that range from 100,000 to 300,000 and a total Native American population of 1.5 million (*See* population figures in App. A). Not all members are Native Americans (*e.g.*, respondent Black), so these percentages are somewhat generous.

[17] "[J]ust as not all congregations accepting the basic doctrines of Christianity belonged to the Catholic Church, so not all groups accepting the basic doctrines of Peyotism belong to the Native American Church." Slotkin, *supra* at 68.

[18] A transcript of the relevant portions of the September 25, 1987, hearing before the Oregon Board of Pharmacy is attached as Appendix B. We refer here to "legislative facts" as the concept is used to identify facts having relevance to law-making reason and policy, whether in the course of deciding cases or in the enactment of laws. *See* Fed. R. Evid. 201 advisory note. For this purpose, such facts are matters of general knowledge of which the Court properly can and often does take judicial cognizance. *See, e.g.*, *Muller v. Oregon* 208 U.S. 412, 421 (1908); *Brown v. Board of Education*, 347 U.S. 483 (1954).

More information is available in the form of documentation provided by anthropologists and others who have studied the Native American Church and Peyotism generally. Descriptions nonetheless are fragmentary. For the most part, the religion is described as relatively individualistic. There is no officially promulgated doctrine,[19] beyond perhaps the basic belief in the sacred nature of peyote, its medicinal value and its use to foretell the future, to find lost objects, and to give power to the user. STEWART, *supra* at 17, 41.[20] Ceremonies are traditionally held at night and generally follow common patterns of singing, prayer, quiet contemplation and the use of a variety of symbolic and culturally significant objects. LA BARRE, *supra* at 56.[21] However, the leaders of the ceremony have full authority to change the rituals in any way they choose, or in any way that peyote teaches them to change them. As a result, even the same leader will not always conduct any two ceremonies in identical fashion. *E.g.*, LA BARRE, *supra* at 63, 75.[22]

Ceremonies may be called to heal the sick or for any other reason, such as to give thanks for cures, to pray for loved ones away from home, to celebrate birthdays and holidays, or to help someone with a particular problem.[23] The actual frequency of the ceremonies depends in part on the amount of peyote that can be procured.[24] Peyote may also be used for some of the same purposes on an individual basis, outside of group ceremonies.[25]

Little has been written about limitations on who may attend the ceremony, except for frequent notations that women traditionally could not attend, but generally do so

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[19] Slotkin describes the Peyote religion generally as lacking any kind of "official" doctrine. SLOTKIN, *supra* at 68. He similarly describes the NAC as "a very loose federation" primarily designed to serve only as a political interest group for the practice of Peyotism generally, even though not all Peyotist groups are affiliated with that church. *Ibid. See also* ABERLE, *supra* at 19 (NAC exists primarily to facilitate political recognition and not the regulation of belief or ritual); GRINSPOON/BAKALAR, *supra* at 53 (same).

[20] In this regard, the peyote doctrine is strikingly similar to the beliefs that attach in various religions to the powers of other hallucinogenic plants. These plants, too, typically become sacred and are valued for their power to assist in finding lost objects, in foretelling the future, in curing mental and physical illness, and in giving power to the user. GRINSPOON-/BAKALAR, *supra* at 37-38.

[21] The available documentation provides often lengthy and detailed descriptions of these aspects of the ceremony. *See, e.g.*, SLOTKIN, *supra* at 22-27; ANDERSON, *supra* at 45-48; STEWART, *supra* at 339-75.

[22] *See also* ABERLE, *supra* at 143, 157-63.

[23] SLOTKIN, *supra* at 22, 72; ABERLE, *supra* at 125-26; ANDERSON, *supra* at 43; LA BARRE, *supra* at 58.

[24] SLOTKIN, *supra* at 22.

[25] ANDERSON, *supra* at 91 (some tribes limit peyote use to the night-long ceremony, while others permit it to be used at any time to treat the ill); SLOTKIN, *supra* at 76 (in the most serious cases of illness, a doctoring meeting is held; in other cases a sick person may take the peyote for himself in whatever amount needed to restore health); ABERLE, *supra* at 157-63 (describing development of peyotist belief system that includes eating some peyote every day as prayer); LA BARRE, *supra* at 58 (identifying some tribes that believe in peyote use outside of meetings, as when practicing peyote songs or solving personal problems).

now.[26] Some sources suggest that children in fact attend and participate in the ceremony.[27] Indeed, one recounts at length a ceremony held for schoolchildren prior to their leaving the reservation to attend school, and describes the special ingestion of "rolled peyote" by the children. ABERLE, *supra* at 144-50. And although religious users recognize peyote "to be tricky" and unpredictable, so that a person's mental state and emotional preparation are important to avoid a bad experience,[28] it is used to treat mental as well as physical illness.[29] Finally, there usually are no restraints on the amount of peyote ingested. As a matter of ritual, each participant in the ceremony first ingests four peyote buttons, an effective hallucinogenic dose.[30] After that, participants are free to take as much as they wish.[31] Amounts of the drug ingested vary widely, with averages estimated at eight to twenty peyote buttons, and highs ranging from thirty to seventy-five and even 100.[32]

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[26] ANDERSON, *supra* at 45; LA BARRE, *supra* at 60.

[27] ANDERSON, *supra* at 45 (most tribes openly invite both women and children to attend and participate) and 49 (many tribes allow both sexes and all ages to attend, although some do not allow women); STEWART, *supra* at 58 (quoting letter from peyotist explaining that no women or young people earlier participated, "as they do now").

[28] *E.g.*, ABERLE, *supra* at 143.

[29] ABERLE, *supra* at 125 (describing three observed instances where peyote was used to treat psychotic individuals during the ceremony); LA BARRE, *supra* at 88 (describing peyote as traditionally used to treat people with mental problems).

[30] The effective dose for peyote is 200 mgs, which is estimated to be about 3 to 5 buttons. GRINSPOON/BAKALAR, *supra* at 21.

[31] ANDERSON, *supra* at 46; STEWART, *supra* at 37-39 and App. A; LA BARRE, *supra* at 65; SLOTKIN, *supra* at 74.

[32] LA BARRE, *supra* at 65-66; SLOTKIN, *supra* at 22; ANDERSON, *supra* at 107. Personal accounts of upper estimates may sometimes be inflated because the amount of peyote a religious user can ingest is often a source of prestige and pride. LA BARRE *supra* at 66.

B. Legally, NAC Peyote Use Is Not Meaningfully Distinguishable from other Religious Drug Use.

We detail some of the available information on NAC and Peyotist practices, not to suggest those practices in any way lack dignity or sincerity, but to demonstrate the very real problem government faces. Many individuals and groups seek free exercise exemptions from government's drug laws. Somehow, government must know how to distinguish one religion's drug use from that of any other religion, or at least it must if controlled substance laws are to be free of "myriad exemptions flowing from a wide variety of religious beliefs." *United States v. Lee*, 455 U.S. 252, 260 (1982).[33]

Factually, there is far less to distinguish religious use of peyote from the religious use of other drugs than lower courts have assumed and generalized assertions of "carefully circumscribed" ceremonial use and long-standing tradition suggest. *See* Pet. Br. at 25-31 and cases discussed therein. Constitutionally, the distinctions respondents and *amici* ask the Court to draw are simply impermissible. Neither government nor courts can protect established religions and accepted doctrinal positions over those that are highly individual or of more recent inspiration. *Frazee v. Employment Security Department*, ___ U.S. ___, 109 S.Ct. 1514 (1989); *Thomas v. Review Board*, *supra* at 716. Without question, courts have no competency to question the centrality of particular beliefs or practices to a faith, or the validity of particular interpretations of those creeds. *Hernandez v. Commissioner of Internal Revenue*, ___ U.S. ___, 109 S.Ct. 2136, 2149 (1989); *Lyng v. Northwest Indian Cemetery Protective Assoc.*, 485 U.S. ___, 108 S.Ct. 1319, 1329-30 (1988); *Thomas v. Revenue Board*, *supra* at 716.

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[33] It must, for example, understand how to exempt the NAC and not a peyotist church that subscribes to the same basic tenents, has only 50 or so active members, keeps careful records of its peyote possession and distribution, screens its membership for sincerity, and is willing to conform and cooperate with government in any way necessary to satisfy government that its use of the drug is carefully circumscribed. *Peyote Way Church of God, Inc. v. Meese III*, 698 F.Supp. 1342 (N.D. Tex. 1988) (denying constitutional protection). Similarly, government must know how to draw the line to deny protection to a church that uses a drug generally considered less dangerous and unpredictable than hallucinogens like peyote (*i.e.*, marijuana). *E.g*, *Commonwealth v. Nissenbaum*, 404 Mass. 575, 536 N.E.2d 592 (1989); *Olsen v. DEA*, ___ F.2d ___, 58 U.S.L.W. 2023 (D.C. Cir. 1989).

Nor can constitutional protection expand and contract on the basis of government's willingness to regulate religious distribution and possession of a drug intensively for one church and not others, as the Texas regulatory scheme does for NAC alone. (Resp. Br. Appendix B). Moreover, any kind of "pervasive monitoring" and government regulation of religious practice would itself raise constitutional problems, *e.g.*, *Aguilar v. Felton*, 473 U.S. 402, 413 (1985), and surely it would do so if government were permitted to pick and choose the religions it monitored. Finally, contrary to a recent lower federal court decision, the relatively minor amount of peyote that is seized annually cannot provide any legitimate basis to distinguish religions using other drugs. *Olsen v. DEA*, ___ F.2d ___, 58 U.S.L.W. 2023 (D.C. Cir. 1989). Such an inquiry says nothing about a particular religious group's use of a drug. The scope of First Amendment's protections cannot vary depending on the size of the religion, the popularity of its sacrament, or government's choices about where to concentrate limited resources in interdicting unlawful drug trafficking.

Perhaps recognizing the difficulty of limiting the principle they advance, respondents argue that under *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court need not worry whether NAC use of peyote can be distinguished from other religious drug use. (Resp. Br. 23). *Yoder* holds, according to respondents, that a court should consider only whether the particular denomination at issue can be accommodated. (Resp. Br. 23). It is true, as respondents note, that the

Court began its analysis in *Yoder* by looking at the effect accommodating the Amish religion would have on government's interest. (*See* Resp. Br. 23-24). But it did not end the inquiry there. The Court then considered whether other religions could make the same claim for accommodation. *Wisconsin v. Yoder*, 406 U.S. at 235-36. Indeed, the Court consistently has "look[ed] . . . beyond the present case" when assessing how an exemption for a religious practice will affect government's interests. *Lyng v. Northwest Indian Cemetery Protective Assoc.*, *supra*, 108 S.Ct. at 1327; *United States v. Lee*, 455 U.S. 252 (1982); *Gillette v. United States*, 401 U.S. 437 (1971).

Respondents argue alternatively that under *Yoder* the burden is on the State to present evidence that exempting NAC use of peyote would frustrate Oregon's interest. (Resp. Br. 23-24). The Court explained in *Yoder*, however, that the Amish had made a "convincing showing" that their informal vocational training advanced the State's "overall interests" in compulsory education. 406 U.S. at 235-36. Only then did it become incumbent on the State to show with more particularity how its interests would be adversely affected. *Ibid.* In this case, unlike the record the Amish created in *Yoder*, respondents rely primarily on broad generalizations. As explained above, there is little we can say with confidence about the NAC's use of an admittedly dangerous drug, and what we can glean from anthropologists is not always comforting.

But even if respondents had created a record equivalent to that of the Amish in *Yoder*, this case differs from *Yoder* in two significant respects. First, in *Yoder* the State's and the Amish's interests were, in many ways, parallel. *See Wisconsin v. Yoder*, *supra*, 405 U.S. at 238-41 (White, J., concurring). The Amish participated in the state school system, except for the last two years of compulsory education, and the

Court emphasized that the vocational education the Amish received at home had been described as "ideal." 406 U.S. at 224. Unlike the Amish, respondents' religiously motivated drug use is flatly inconsistent with the State's regulatory interest.

Second, *Yoder* was quite careful to distinguish the State's interest in education from its interest in preserving the physical and mental health of its citizens. 406 U.S. at 230. Unlike *Yoder*, the practice at issue here directly affects physical and mental health. The State's health interests in preventing the use of peyote is no different from its interests in preventing the use of mescaline, psilocybin, and LSD, all of which have substantially the same hallucinogenic properties as peyote.[34] Unlike the Amish's practices, the state cannot accommodate religiously motivated drug use without substantially compromising its interests in the health and safety of its citizens.

Nor can Oregon accommodate the drug use of some religions, but not others, without sacrificing its interest in religious neutrality. The Court's First Amendment jurisprudence places a valued premium on governmental neutrality in matters of religion. *E.g.*, *Larson v. Valente*, 456 U.S. 228, 244 (1982); *Gillette v. United States*, 401 U.S. at 450. That same value is equally if not more firmly grounded in the Oregon Constitution, which demands strict government neutrality

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[34] Except for differences in chemical structure and dosage required for an hallucinogenic effect, peyote, LSD, mescaline and psilocybin are remarkably similar. The subjective effects of these drugs are so alike that researchers have been unable to identify a reaction distinctly associated with one and not the other. ANDERSON, *supra* at 110-12. The effects of all of these drugs contrast with non-hallucinogens such as marijuana, which is considered milder and more controllable than peyote or LSD. GRINSPOON-/BAKALAR *supra* at 21. Marijuana "has been compared to walking a foot off the ground as opposed to the intergalactic voyage produced by LSD, or likened to a pony in contrast with the locomotive of mescaline." *Id.* at 29.

among religions. *Cooper v. Eugene Sch. Dist. No. 4J*, 301 Or. 358, 371, 375, 723 P.2d 298 (1986), *appeal dismissed* 480 U.S. 942 (1987).[35] This state constitutional principle requires that what the State allows for one religion must be allowed for all. *Employment Div. v. Rogue Valley Youth for Christ*, 307 Or. 490, 770 P.2d 588 (1989); *Salem College & Academy, Inc. v. Emp. Div.* 298 Or. 471, 695 P.2d 25 (1985). Indeed, the Oregon Board of Pharmacy declined respondent Smith's request to create an exemption for NAC peyote use in part because the Oregon Constitution would require expansion of the exemption to other religions.[36] In this respect, Oregon's interests may differ from those of other states. An exemption for the NAC alone, even one dictated by the federal constitution, would compel Oregon under its state constitution to extend the same accommodation to other religious organizations and individuals. Oregon thus cannot crack the door open, as respondents implicitly urge, without permitting it to swing wide. No judicial or legislative body in the country has viewed that result as anything less than devastating to government's compelling interest in controlling dangerous drugs.

It may be that some jurisdictions can craft laws to accommodate religious drug use in constitutionally permissible ways. As we have demonstrated, however, the task of doing so in the area of religious drug use is at best delicate. Where, as here, government effectuates a concededly compelling interest through a religiously neutral law that applies to all citizens in an even-handed way, the Free Exercise Clause requires no more. Government should not be forced to draw regulatory lines between religions in an area where it can have no confidence that those lines can be guided by a "steady hand." *Cf. United States v. Allegheny County*, 322 U.S. 174, 176 (1944) (Jackson, J.).

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[35] As the state supreme court explained in *Cooper*, the "religion clauses of Oregon's Bill of Rights . . . are specifications of a larger vision of freedom for a diversity of religious beliefs and modes of worship and freedom from state-supported official faiths or modes of worship." *Id.* 301 Or. at 371.

[36] The Oregon Board of Pharmacy retracted an NAC-specific exemption after first promulgating one at respondent Smith's request. The Board did so after asking for the Oregon Attorney General's review of the rule and after being advised that a denomination-specific exemption, if within the Board's authority to enact, would violate the Oregon Constitution. The Attorney General's counsel was consistent with the positions he has taken and prevailed upon in the Oregon courts in state appellate cases such as those cited above.

CONCLUSION

The judgment of the Oregon Supreme Court should be reversed.

Respectfully submitted,
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APPENDIX A

Native American Population Figures[1]

State	Native American Population	Express Legislative Exemption
1. California	227,757	no
2. Oklahoma	171,092	no
3. Arizona	154,175	yes
4. New Mexico	106,585	yes
5. North Carolina	65,808	no
6. Washington	61,233	no
7. Texas	50,296	yes
8. South Dakota	45,525	yes
9. Michigan	44,712	no
10. New York	43,508	no
11. Montana	37,623	no
12. Minnesota	36,527	yes
13. Wisconsin	30,553	yes
14. Oregon	29,783	no
15. Florida	24,714	no
16. Alaska	22,631	no
17. Colorado	20,682	yes
18. Utah	19,994	no
19. North Dakota	19,905	no
20. Illinois	19,118	no
21. Kansas	17,829	yes
22. Ohio	15,300	no
23. Missouri	14,820	no
24. Nevada	14,256	yes
25. Louisiana	12,841	no
26. Arkansas	12,713	no
27. Pennsylvania	10,928	no
28. Idaho	10,405	no
29. New Jersey	10,028	no
30. Georgia	9,876	no
31. Virginia	9,867	no
32. Indiana	9,495	no
33. Alabama	9,239	no

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[1] Based on census figures contained in Table 232, General Social and Economic Characteristics, United States Census, 1980.

State	Native American Population	Express Legislative Exemption
34. Nebraska	9,059	no
35. Massachusetts	8,996	no
36. Maryland	8,946	no
37. Wyoming	8,192	yes
38. Tennessee	6,946	no
39. Mississippi	6,836	no
40. South Carolina	6,655	no
41. Iowa	6,311	yes
42. Connecticut	4,822	no
43. Kentucky	4,497	no
44. Maine	4,360	no
45. Rhode Island	3,186	no
46. Hawaii	2,833	no
47. West Virginia	2,317	no
48. Delaware	1,380	no
49. New Hampshire	1,342	no
50. Vermont	1,041	no
51. District of Columbia	986	no
TOTAL	1,478,523	

APPENDIX B

Oregon State Board of Pharmacy
P.O. Box 231 — 1400 SW 5th AVENUE, ROOM 904
PORTLAND, OREGON 97207 PHONE 503/229-5849

OREGON STATE BOARD OF PHARMACY
RULES HEARING
SEPTEMBER 25, 1987

The following people spoke on a proposed rule allowing non-drug use of Peyote in qualified religious ceremonies:

Sande Schmidt	917 SW Oak Suite 410	Portland, OR
Al Smith	295 N. Brooklyn	Eugene, OR
Maria Temoria		Salem, OR
Stanley Smart		McDermit[t], NV

The following people spoke on a proposed rule adding precursors as controlled substances under Schedule II:

Donald Potter	1690 Woodland Terrace	Lake Oswego, OR
Michael Eyer	811 SW 6th	Portland, OR
Don Pizzo	11300 SE Fuller Rd.	Milwaukie, OR
Dennis O'Donnell	1243 State St.	Salem, OR
Jim Bellah		Portland, OR
Michael Heumann		Portland, OR
Captain Brooke		Portland, OR

Board Members Present

Ruth Vandever, Executive Director

George Gerding
Alan Kendrick
Warren Robinson
Bud Rose
Louise Shields
Madalyn Whitaker
Royce Williams

Board of Pharmacy
Rules Hearing
September 25, 1987

Good morning, I'm Alan Kendrick, President of the Board of Pharmacy and presiding officer for this hearing. The time is 9:10 a.m.. Today is Friday, September 25, 1987 and this is the time and the place for the public rules hearing.

The Board, in accordance with the rulemaking procedures outlined in Chapter 183 of the Oregon Revised Statutes has called this public hearing to receive data, arguments, or testimony relating to the promulgation of the new rules. Any person wishing to be heard shall advise the board of his or her name, address, and affiliation by signing in on the opponent/proponent sheets located on the table near the door, or that John has on the clipboard.

The rules to be considered at this hearing are necessary to: 1. Allow non-drug use of Peyote in qualified religious ceremonies of the Native American Church. 2. Add pharmacy board newsletters as a part of the minimum equipment requirement in retail and institutional drug outlets. 3. Allow pharmacists to dispense on refill up to a three day emergency supply of a prescription drug when the prescriber's not available, an emergency need for the refill has been established, and the drug is not a controlled substance. 4. Add the following substances as controlled substances under Schedule II: Phenylacetic acid, Methylamine, Anthranilic acid, L-Ephedrine, dl-Ephedrine, except that any combination or compound containing Ephedrine, or any of its salts or isomers which is prepared for over the counter sale is exempted. 5. Provide for administrative rule review as required by the Oregon statute.

The order of the presentations will be the statements of proponents, the statements then of opponents, and then the statements of any other witnesses present and wishing to be heard. The presiding officer or any member of the board shall have the right to question or examine any witness making a statement at this hearing. There shall be no rebuttal or additional statements given by any witness unless requested by the presiding officer. However, when such additional statement is given the presiding officer shall allow an equal opportunity for reply.

The hearing may be continued with recesses as determined by the presiding officer until all listed witnesses present and desiring to make a statement have had an opportunity to do so.

The presiding officer may set reasonable time limits for oral presentation and may exclude or limit cumulative, repetitious, or immaterial matter.

A taped record will be made of all the proceedings. We'll call our first witness and that will be under rule considered number 1; allow non-drug use of Peyote in bona-fide religious ceremonies of the Native American Church. Our first witness is Sande Schmidt.

Good morning, I'm Sande Schmidt, staff attorney with the Native American program of Oregon Legal Services. I'm today representing Al Smith who is also here to testify in favor of this rule. Al is a Klamath Indian who participates in Native American Church ceremonies. Members of the Native American Church use Peyote as a sacrament in their religious ceremonies. When members engage in such religious practices in Oregon they are exposed to potential criminal prosecution, for there's no exemption from Oregon's controlled substances law for the religious use of Peyote. The proposed rule before the board today would correct that situation.

I've prepared written comments to submit to the board and a whole packet of information so I'll just summarize those comments at this point.

Clearly when Congress adopted the Federal laws making the use and possession of Peyote illegal, they did not intend or believe that they were making the religious use of Peyote illegal. In 1978 Congress passed the American Indian Religious Freedom Act which expressly committed the Federal government to protecting the religious practices of American Indians. In passing and considering that legislation they thought there were basically three areas of concern that they were trying to protect. One was access to particular sacred sites, one was the possession and use of sacred objects and substances, and the third was the actual interference with ceremonies.

The legislative history, and I'll quote their discussion of trying to protect the use of sacred substances, "the second major area is the restrictions on use of substances. To Indians these natural objects have religious significance because they are sacred, they have power, they heal, they are necessary to the exercise of rights of the religion, they are necessary to the cultural integrity of the tribe, and therefore the religious survival, or a combination of these reasons. To the Federal government, these substances are restricted because the non-Indian has made them scarce as in the endangered species, or because they pose a health threat to those who misuse them, as in Peyote." The legislative history goes on to note that the Federal government and the courts have carved out an exception to deal with this, so that there's an exception in Federal law for the bona-fide use of Peyote in a bona-fide religious ceremony. Today also the Federal Drug Administration exempts the religious use of Peyote from criminal sanction. Many states have also adopted, by legislation, exemptions for the religious use of Peyote. I've enclosed copies of several of those statutes, there's 10 or 11 in here for the record. Many other states have exempted it by case law, judicially. One of the best known cases of those is the landmark California case, The People v. Woody and that is also enclosed for the record. I'm also submitting several articles on the sacramental use of Peyote and a statement of Stanley Smart, a recognized leader of the Native American Church and a road chief.

These statements and articles point out that there have been studies and observations on the sacramental use of Peyote and they have indicated absolutely no negative health effects. There's no evidence indicating that sacramental Peyote use leads to dependency, addiction, drug use or misuse. In examining the court cases and looking through all these studies we have been unable to locate any evidence or any study that indicates sacramental use of Peyote in religious ceremony presents a danger either to the individual self, the people who are participating in the ceremony, or to the public at large. We're also not aware of any arrest or attempts to enforce Oregons law presently. So we have no awareness or knowledge that this is in fact a law enforcement problem in Oregon. I do propose a slight change in the wording of the proposed rule, and in my materials I'm submitting a copy of that proposed change. And I suggest replacing the reference to Native American Church with bona-fide religious organization.

There's an old ruling in the 9th Circuit Court of Appeals that raises a legal concern that if only one church is referred to that may raise equal protection problems. There's no concern in other circuits because there's no other circuit who has reached a similar conclusion. All the other circuits have said, that have looked at this issue, that the Native American Church is unique and it is permissible to refer only to that one church. The 9th Circuit has said that it is doubtful that you can refer to just one church. Several states, especially several states in the 9th Circuit, have addressed this problem by not referring to the Native American Church by name, but referring to any bona fide religious organization. So I propose that change. Other than that small change I think the wording and adoption of this rule is excellent. Those are my comments and here are my materials for the record. Thank you.

Vandever: Just one question, the states that have adopted this exception, have they pretty much followed the Federal language?

Schmidt: Yes, I think as I said there are 10 or 11 copies in there. Most have followed the language of the Federal rule or the structure. There are three states right on top; Nevada, New Mexico, and Colorado, who have done the language that I just proposed—bona fide religious organization instead of Native American Church. There are a few that the language is different. One state has put it in terms of a defense that can be raised as opposed to a straight exemption.

Vandever: Is there any movement by the Federal government to change their language on this?

Schmidt: None. In fact, since then, it's a 1972 9th Circuit case, and since that time the Federal Government has reorganized their Federal regulations and have continued with exactly the same wording. I'm not aware that anybody's enforcing the 9th Circuit decision. But our concern in raising this is this law is not being enforced now in Oregon, but it's quite a cloud on people who practice this religion, to be aware that they are exposed to criminal liability every time they attend church. We want to remove that cloud and I don't want to remove it by having a rule enacted that there's any cloud about, so that's why I suggest the wording change.

Kendrick: As I recall, in the original request for the administrative hearing it was my interpretation that a very few in the organizations participate in this ceremony. You had to be of a certain rank, like a minister or that type, is that true? I'm almost hearing that maybe there are more than just the leaders of the church.

Schmidt: Well there are definitely more than the leaders of the church that participate in the ceremony, it's the leaders of the church who conduct the ceremony and who administer the Peyote in the ceremony. So they are the ones who would possess it, carry it, who would administer it in the ceremony. If, in talking with my clients this morning, with our knowledge and understanding of what the Oregon Indian community is like, we estimate there are about 100 people in the state who participate in Native American Church ceremonies. People can attend church without being members of the church so it's not possible to say exactly the numbers, but we believe it's about 100 people in the state of Oregon.

Kendrick: And this would be administered to all who attended the church services?

Schmidt: If they would choose to do that. There's not usually a hundred at the ceremony. There are ceremonies in different spots around the state. That would be the number. And under this exemption, the exemption is for the ceremonial use only. I don't know what the concern that you're raising but the only concern that's been raised in other states has been what if there are people who aren't legitimately participating in the ceremony but who raise this as a ruse, as a false protection for illegal or recreational activity. And the courts have been adept at handling that. When those individuals are prosecuted, the bona fides of their religion whether or not it's a legitimate ceremony, and whether or not they're a member of the church is part of the evidence that's put on in court and can be challenged.

Kendrick: Would a non-member who decides they want to participate and have never been there could come and participate and receive the Peyote?

Schmidt: Uh Huh (yes).

Vandever: I have one other question. I was curious to know whether the states that adopted the language that you suggest have had any difficulty in determining what a bona fide religious......

Schmidt: I've found absolutely no appelate [*sic*] cases in those states. So if there has been any problem it has not reached the level of amending the statute or being in appelate [*sic*] case.

Kendrick: Do any of the members have any questions?

Robinson: I have a question. Any idea of the number of persons belonging to this religious group over all?

Schmidt: Nationwide?

Robinson: Yes.

Schmidt: The numbers vary anywhere from 100,000 to 300,000 in the nation.

Kendrick: No other questions? Thank you for your attendance.

Schmidt: Thank you.

Kendrick: I believe we have an Al Smith? Please state your name and address before your testimony.

Smith: My name's Albert L. Smith. Address is 295 N. Brooklyn, Eugene, OR.

As a native person, I was born and raised in the state. I was educated in Parochial schools. I'll just give you a brief history of my life to explain why I'm here. I'm 67 years old, and for a number of years I was an alcoholic, and I sobered up in this town 30 years ago as a member of Alcoholics Anonymous. After 18 years of sobriety I was introduced then to the Native American religion—sweat lodge ceremonies, pipe ceremonies, sun dance ceremonies.

About 8-9 years ago I was then introduced to the Native American Church and attended my first ceremony. The Native American spirituality is very beneficial in my life. It gives me something to look forward to—a purpose. And I find it very difficult, when I'm being threatened if I go to church, to attend church. So one of my concerns is that, with talking with the Native American program if we could have the rule changed so native people can feel not threatened to attend the Native American Church sweat lodge ceremonies. There was a time sweat lodges were torn down and congress then passed a law in 1978, the Native American Freedom of Religion Act, so that we were allowed to go to church. We were the first citizens here. So I'm here before you today to ask you to go ahead and adopt this rule so we can feel, as citizens of the state, an equal right to attend a religion. That's why I'm here.

Kendrick: Any questions? No questions. Thank you Mr. Smith. As our next individual to participate, I have—I hope I don't mispronounce this too badly. Is it Manda Temoria? Close? Maria? Pharmacists are supposed to be able to read writing, right?

Tenorio [*sic*]: I have a prepared statement but I just would like to talk to you directly because the issue is one of strong importance to me.

Kendrick: Would you state your full name and your address please? Before you start.

Tenorio [*sic*]: My name is Maria Temoria, I live in Salem. I am presently employed in the Civil Rights section of the Department of Transportation. I have taken time off my job today to be here. And I think that's one similarity that we share. There are probably other similarities—we are all employed by the same employer, the State of Oregon. Perhaps another similarity is that most of us around the table, if not all of us, have some sort of religious tenets, have a belief in a higher order, a spiritual creator, some religious stamp upon life and how we direct ourselves daily, whether it's as a Protestant, Catholic, or whether we have some individual religious practice. I think there are also some differences that we have, and one of those is perhaps that I'm the only one at this table that practices and believes in Indian religion and that includes not only the Native American Church which I have been an active member of for some seven years now, but also the pipe religion and pipe ceremonies, the sweat lodge ceremonies, and the sun dance ceremonies.

One of the things I'd most like to impress upon you is the fact that while Sande Schmidt emphasized that there have been no law enforcement problems here, at least that we've seen in the past seven to ten years, where we have participated in ceremonies. There is still a heavy hearted feeling that many of us have to know that there are rules on the record or that there is prosecution still of our religion and our religious practices. I certainly am gratified that this formal board is considering a rule that will appease that fear and that insecure part of knowing that when you attend a religious ceremony that you are being questioned and you could be criminally prosecuted.

I think the question was raised about other participants who come into our ceremonies. We have never prostheletized; tried to go out and get people to convert to our religion, that's the way Indian religion is. On the other hand, we don't look down on people who use wine in their church. We don't consider people who use wine in their churches as alcoholics or consider that if they go into a church ceremony once a year and have wine that they will become alcoholics or relapse or anything. There's a need for mutual respect, and I guess my final request is to ask that when you make your decision that you weigh our statements with the same thoughtful religious tolerance that your forefathers sought when they came to our land. Thank you.

Vandever: I would just like to know how open is the church to new members, is it easily accessible to anybody who would like to become a part of that church?

Tenorio[[*sic*]: I'm not sure that I'm the appropriate person to answer that, we have a road chief who has been on the board of the national Native American Church for some years now, and he would have more familiarity with that than I.

Vandever: I was asking it more in tune with the possibilities that the language might be discriminatory if it remains Native American Church.

Tenorio [*sic*]: I think there are some states that have it phrased that way and if there are some legal concerns there that Ms. Schmidt addressed, that would be something that you would want to consider.

Kendrick: I have a question. You related the use of Peyote to possible use of wine in a church ceremony. And once a year an individual coming to church and doing it. How often then, I guess I'm asking, would a normal participant in the Native American Church participate in this ceremony in a year?

Tenorio [*sic*]: It would probably depend on where you're from. Unfortunately here in Oregon we have, I think, not enough medicine people such as Stanley Smart who is from Nevada, and comes to Oregon for us to conduct ceremonies. It's an elaborate process in that you have to have sponsors who are willing to share the cost of a complete meal at the end. It's not a ceremony where people just go away, you have a meal to sort of consummate the entire ceremony and the prayers that were said. So perhaps I have attended maybe one meeting over the past year. That may not be true of people in other parts of the country. But I was not trying to

liken the medicine to alcoholic beverages, I think this is an herb, and our people have always used herbs for medicinal purposes and I think probably you folks know better than anyone else the mood of the country or the swing toward turning again to natural uses of herbs in healing illnesses.

Kendrick: Anyone else have any questions? O.K. thank you Maria. That concludes the number of people I have to speak on Peyote exemption. Do we have anybody in the audience who did not sign up who wishes to speak on this administrative rule change proposal?

Smart: Thank you. My name is Stanley Smart from McDerm [*sic*] Nevada. We have land that's right over in the state of Oregon and Nevada. More like my having jurisdiction over the Oregon border. I've had born with the Native Church and my father was a road man, what we call a road man which conducts the service of the Native American Church. I had been an alcoholic as a youngster myself. I found out a lot of things about the medicine and I know that after finding out, and I realized what it's all about and I have helped a lot of other people working with alcohol, Indian people. There's a lot of survival through sobriety and so I kind of felt that well, we had submitted a statement from my opinion to the board and I thought you might have had other questions rather than whatever you might see on that statement. So I thought, I'm sorry I never signed up for the testimonial but I kind of felt that you might have some questions concerning the use of Peyote and so I have the Peyote like traveling, like a doctor with medicine, I have to take it across, like over the border or somewhere, mostly away from home wherever people are sick and need the medicine. We don't take it every day but if I'm a doctor conducting a service then I usually have to take the medicine in order to kind of be closer to the spiritual, what we call nature, that we're talking to nature. We can't feel it but the prayer itself working with the medicine would heal the person. It has helped a lot of people.

That was the reason I had been in Oregon at the time. Al Smith had a problem with the State of Oregon. We have gained through the Peyote medicine rather than lose, which was called the relapse and to me it's the other way around. We gain by going to a ceremony. Whichever is nearest to us whenever we are able to attend. And that means you gain, it's just like going to church every Sunday. It normally varies from different times, sometimes I ran maybe four ceremonies in a weeks' time, and mostly on weekends through the year, not just once a year. I kind of felt that maybe there was a question that could cause you to pause, could be a question in your minds about the medicine.

We do have members, we don't have any kind of requirements. We have a charge for the state of Nevada and we also have a nationally known Native American Church which is consisting of requirement like a dollar a year for each member, whoever wants to be a member of the church. Older people believe that we are Indians and we should not be following the way we are today, like putting it on paper to be recognized as a member, and the only way we recognize each other is through, like if we all come here tonight, and maybe tomorrow night, we kind of recognize each other that way. So it's not on paper that we have to identify ourselves to be known to be part of the church and so it's more like traditional, originally the way it was handed down to us, there was nothing on paper. We don't have any bylaws. We do have what we call a spiritual law, whatever we do wrong, if we abuse it then it hurts the person or could hurt the family, and so that's a worry. We believe like the same as the ruling you have in the state of Oregon and so we have some people that abuse it, and we really have to be careful ourselves, because we use it as a healer, for a medicine. Therefore I've kind of felt we had to come here and testify in order for you to understand the way it is with the Indian people.

I know that before the time the white people came, they didn't know we were having it, they had it outlawed for awhile but still the people had it out in the mountains to keep alive. During that time the people went for alcohol or drugs—whatever. We've had a lot analyzed, I don't have it with me, but we have a record that we work with the anabolic

just out of Denver, Colorado and he's had a lot of analyses of the medicine itself. Some have said it's a drug, and to the people it's not a drug, it's a medicine, and we put it in a category as separate. There is maybe some poison in it but it has never harmed anybody so that's the reason we say it's a medicine. It heals the person. It has a very bitter taste, you don't take it every day, like every now and then. Now if you have a pain somewhere and then you keep on taking it for that purpose only, we don't take it every day like with our food like you would coffee or pop or whatever. We just take it at certain times when we're ailing with sickness. It has helped a lot of people, especially alcoholics. I worked with Al, I was the first one to introduce him because I told him if you fall into this church you will forever have a better healthy life. And so we find people like that to testify on behalf of the medicine.

I just wanted to let you know there was nothing that is addictive, being addicted to the medicine. We can stay away as long as we want. Whenever you feel the ailment then you feel you have to take it. Like I say it's very bitter and you wouldn't want to take it every five minutes. We also noted that the analyzation had called it a hallucinogenic drug, that's the way they put it, but they're talking of the bitterness could make you sick because you might have something maybe sour or either poisoning inside your system, and whenever you take this medicine when you pray to the creator then it will just bring it out of your system. You'll feel good. You're purified by the medicine. And so that's how it works for people. We have nationally, all over the state, it has went to the Supreme Court several times and they could never define exactly how we could outlaw it against Indian for the use of the medicine. I want to thank the president, and also the board members, and that's all I have to say.

Vandever: Do you know what kind of membership restrictions there are in the Native American Church? Can anybody belong?

Smart: Well, the freedom of religion came about in 78 and we had to look for a policy to be presented within the Federal

Register and we've had a conference in Denver, Colorado and everybody was thinking that the bureau had recognized blood quantum, and so we had put down the one fourth Indian blood in order to be recognized as an Indian. And like I was saying, you know you go in there and we know each other, the people around. So that's how they recognize them, there's no such thing as a card that we can send to identify. But you just participate and that's how we recognize. And so the blood quantum is one quarter Indian to participate, but if you're a non-Indian then you're not allowed.

Vandever: Non-Indians are not allowed to participate?

Smart: No.

Gerding: Mr. Smart, are you the one in this area that makes and controls the Peyote that's used in the ceremony?

Smart: Well, there could be more than myself. Like if you know of some friend from South Dakota or California, anywhere, that if you don't have anyone around that can do it naturally, call on that person to run a ceremony, that's how it's done.

Gerding: But it's controlled with just a few people, generally. Do you grow and prepare this yourself? Do you have control of the product yourself?

Smart: Yes.

Kendrick: You did explain one thing I was a little unclear on, I want to make sure I am clear on it. You really use this not just at a religious ceremony where there is a number of folks, but you may use this on an individual who is sick, in their home; you'd come to their home and administer to them until the sickness is over, is that correct?

Smart: Yes.

Alan: Any other questions? Thank you Mr. Smart. . . .

SUPPLEMENTAL
BRIEF

(10)

Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1988

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EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF OREGON, W.E. HUNTER, ADMINISTRATOR,

Petitioners,

v.

ALFRED L. SMITH, GALEN W. BLACK, AND ADAPT,

Respondents.

◆

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31 pl

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

CONCLUSION 8

APPENDIX A ....App. 1

APPENDIX B ....App. 18

TABLE OF AUTHORITIES

	Page
CASES	
Bowen v. Roy, 476 U.S. 693 (1986)	6
Sherbert v. Verner, 374 U.S. 398 (1963)	1, 5, 6, 8
Smith v. Employment Div., 307 Or. 68, 763 P.2d 146 (1988)	4, 6, 8
State v. Hershberger, 444 N.W. 2d 282 (Minn. 1989)	*passim*
State v. Soto, 21 Or. App. 794, 537 P.2d 142 (1975), *cert denied*, 424 U.S. 955 (1976)	5
Thomas v. Review Board of Ind. Employment Sec. Div., 450 U.S. 707 (1981)	1, 5
Wisconsin v. Yoder, 406 U.S. 205 (1972)	5, 6

STATEMENT OF THE CASE

Respondents file this Supplemental brief, pursuant to United States Supreme Court Rule 35.5, to discuss a relevant judicial opinion decided after the briefs in the present case were filed. The name of the decision is *State v. Hershberger*, No. C9-88-2623 (Sup. Ct. Minn., August 18, 1989), to be reported at 444 N.W. 2d 282 (reprinted as Appendix A).

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SUMMARY OF ARGUMENT

The recent decision of the Minnesota Supreme Court in *State v. Hershberger* is directly relevant to the present case, regarding the constitutional analysis to be applied when religious free exercise claims conflict with alleged compelling state interests enforced with criminal sanctions. The *Hershberger* decision involved the Old Order Amish religion and their use of horse and buggies for transportation, in conformance with their sincere religious beliefs. The State of Minnesota sought to impose criminal sanctions on these religious adherents for their failure, when driving a slow-moving vehicle under Minnesota law, to display a fluorescent orange-red triangular emblem. If the constitutional test propounded by petitioners in the present case had been adopted by the Minnesota Court, the Amish buggy, one of the most enduring images of America, would be banned forever from the national scene. Instead, the Minnesota Supreme Court applied the *Sherbert-Thomas* test advocated by respondents in this case and struck down a neutral, state criminal statute because the conduct at issue, driving a slow-moving vehicle without appropriate warning symbols, could be accommodated through less intrusive means than complete prohibition.

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ARGUMENT

THE HERSHBERGER DECISION SHOWS THAT THE SHERBERT-THOMAS TEST FOR ANALYZING FREE EXERCISE CLAIMS WORKS WHEN APPLIED TO CLAIMS INVOLVING CONDUCT CLASSIFIED AS CRIMINAL BY STATE AUTHORITY.

On August 18, 1989, the Minnesota Supreme Court issued a decision upholding a claim to the free exercise of religion under the First Amendment to the United States Constitution, made in the face of a neutral, valid state criminal statute enforcing a compelling state interest. *State v. Hershberger*, 444 N.W. 2d 282 (Minn. 1989). All of the elements present in the case before this Court were present in *Hershberger*. The decision illustrates the wide-ranging deleterious effect that could occur to any religion if the constitutional test put forward by petitioners in this case is adopted by the Court.

While petitioners have crafted their appeal to this Court to appear as if it only involves the potential abuse of dangerous substances, in reality their proposed test would apply to the exercise of religious beliefs by all faiths. As will be shown below, the effect on free exercise of religion in this country will be substantial and potentially crippling to religions which do not enjoy majority community support.

The facts of *Hershberger* are simple. Minnesota law requires slow-moving vehicles (those travelling under 25 mph) to display an orange-red fluorescent triangular emblem when operated on a public highway. App. A at 14-15 fn.2. The required emblem is the internationally utilized symbol for slow-moving vehicles. App. A at 10. Minn. Stat. § 169.522 (1988). A subdivision of this statute provides for use of an alternate emblem by persons who have a sincerely held religious belief which prohibits their use of the standard emblem. App. A at 14-15 fns. 2,3. This exemption, ostensibly neutral on its face, affects only the Old Order Amish religion. It permits use of a "dull black triangle" with a white reflective border and requires that the operator permanently affix to the rear of the slow moving vehicle at least 72 square inches of red reflective tape. In addition, an operator who displays the alternate emblem must keep a *regular* slow-moving vehicle emblem in the vehicle and display the regular emblem during night hours or inclement weather.

Appellants in *Hershberger* were members of the Old Order Amish religion who refused to display the regular slow-moving vehicle emblem under any circumstances or to display the 72 square inches of red reflective tape required under the alternate slow-moving vehicle emblem provision. App. A at 3. Each appellant had received traffic citations for non-compliance with the statute, *Id*. At least one of the appellants had already suffered jail incarceration for violating the statute, and the other appellants were willing to suffer similar sanctions rather than give up their religious beliefs. App. A at 7. Not all members of the Amish community were unwilling to comply with the state slow-moving vehicle emblem statute. App. A at 16 fn.4.

Most of the elements now present in the *Smith* case were also present in *Hershberger*. Minnesota had an admitted compelling state interest: "public safety to all who travel on the state's highways." App. A at 10.[1] The conduct at issue – driving dark, slow-moving horse-drawn buggies – is admittedly dangerous to the public at large (those citizens driving at night on the public highways who are likely to impact an unseen, unmarked slow-moving vehicle),[2] as well as those individuals engaging in the conduct (Amish adherents who are likely to be injured by impacts from fast-moving vehicles whose drivers do not see their buggies).[3] There can be no dispute that Minnesota has a valid interest in preventing accidents between automobiles and unmarked slow-moving vehicles.

In the present case, petitioners are advocating the following constitutional test: if a state has legislatively proscribed certain conduct, no constitutional right exists to engage in that conduct and no inquiry is required to determine whether the proscription at issue is necessary

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[1] The alleged compelling state interest in *Smith* is the interest in proscribing the availability of dangerous drugs.

[2] In *Smith* the alleged danger to the general public is the spread of illegal substances and their deleterious effect on society.

[3] In *Smith* the alleged danger to the individual is the potential deleterious health effect of ingesting peyote. *See* App. A at 10 (Point No. 3).

or whether religious exercise can be accommodated by less intrusive means. This proposed test is taken directly from *State v. Soto*, 21 Or.App. 794, 537 P.2d 142 (1975), *cert. denied*, 424 U.S. 955 (1976), where the Oregon Court of Appeals held that "a positive legislative declaration" is a statement that "as a matter of law" the state has a compelling state interest which would be frustrated by any exception.

If petitioners' proposed constitutional test had been applied in the *Hershberger* case, the Amish horse and buggy, one of the most evocative images of the American landscape, would have been forever banished from the land. The state has validly proscribed the operation of unmarked, slow moving vehicles on state highways in low visibility conditions in a neutral, even-handed manner that does not take the religious beliefs of the Old Order Amish into account. The Amish, exercising their sincerely held religious beliefs, cannot comply with this neutral state law in the operation of their horse and buggies. Without some compromise, the Amish in *Hershberger* would suffer incarceration and the exercise of their religious beliefs would be prohibited. Surely the First Amendment, which was adopted by a nation comprised in large part of people who fled their homelands to avoid religious persecution, requires something more.

Instead, the Minnesota Supreme Court in *Hershberger* applied the constitutional test developed by this Court in *Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Review Board of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981); and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In its opinion, the Minnesota Court stated:

> "Surely, if the infringement of rights under the Free Exercise Clause is substantial when the consequence involves merely temporary deprivation of unemployment compensation, the potentiality, if not the certainty, of criminal sanctions including fines or jail time equally and substantially infringes upon the rights these appellants enjoy in the free exercise of their beliefs under the First Amendment."

App. A at 8, (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Bowen v. Roy*, 476 U.S. 693, 704 (1986)). Utilizing the analysis refined by this Court in *Thomas*, the Minnesota Supreme Court conducted "an inquiry into whether the burden is justified by a compelling state interest which cannot be served by a less intrusive alternative," with the burden of proof resting on the State to demonstrate that no alternative forms of regulation exist. *Id.* (citing *Sherbert v. Verner*, 374 U.S. at 406-07).[4] The Court rejected "non-specific anecdotal claims" of the same type presented by petitioners in this case, *See* Reply Brief for Petitioners at 12-14, and found that the State had failed to present any evidence that the specific conduct complained of (driving a slow-moving vehicle without a warning symbol) had resulted in any public safety concerns (accidents). App. A at 10.

Nonetheless, accepting the State's interest as compelling for purposes of analyzing the religious claim, the Minnesota Supreme Court proceeded to consider evidence of whether this interest could be accommodated by a less restrictive alternative which did not "significantly diminish" the public safety interest. App. A at 12. Finding that such a reasonable alternative did exist, the Court struck down the state statute as applied to appellants in *Hershberger*, and upheld the Free Exercise claim.

In the present case petitioners argue against any burden of proof by asserting that such a burden "would shift a heavy, perhaps insurmountable burden on the government to disprove a free exercise defense. . . ." Brief for Petitioners at 24. As *Hershberger* illustrates, however, the burden on government is not difficult and is necessary if limitations on the free exercise of religion are to be prevented without some kind of evidentiary hearing and objective consideration of the competing state regulatory and individual constitutional interests. This is a minimal burden when the potentially devastating effect – the destruction of an entire religion – is taken into account. *Hershberger* illustrates the ease with which the *proper* forum can apply the current constitutional test. In the present case, that forum might be the Oregon Pharmacy Board, which started to consider the issue before being advised to stop because of the present litigation.

In the present case no evidentiary hearing has ever taken place. This case has always been an unemployment proceeding and the Oregon unemployment process is not set up to analyze and decide the constitutional question. Indeed, petitioners have previously argued that the Oregon Employment Appeals Board lacked jurisdiction to consider anything except Employment Division law. *See*, Appendix B, Exhibit 8, pp. 23-24, of the Index of Exhibits transmitted from the Oregon Employment Appeals Board to the Oregon Court of Appeals in *Smith v. Employment Div.*, No. CA-A-33421, opinion reported at 75 Or. App. 764, 709 P.2d 246 (1985). As discussed earlier, the Oregon Supreme Court has ruled that Oregon's unemployment process "is neither designed nor equipped" to address this issue. *Smith v. Employment Div.*, 763 P.2d at 148 n.3. If any resolution other than rejection of petitioners' position takes place in this case, the proceeding should be remanded for a full evidentiary hearing before resolution of the constitutional issue occurs.

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[4] This holding rebuts petitioners' argument, based on a strained interpretation of *Wisconsin v. Yoder*, that they have no burden of proof and that respondents failed to present any evidence. Reply Brief for Petitioners at 17. As the Oregon Supreme Court has stated, there was no opportunity in this case within the unemployment process to present the kind of evidence necessary to fully analyze the First Amendment claim; it should instead have been presented in the context of a criminal prosecution. *Smith v. Employment Div.*, 307 Or. 68, 763 P.2d 146, 148, n.3 (1988).

◆

CONCLUSION

Respondents maintain that it is not necessary to remand this decision, however, because, as previously argued, this case is indistinguishable from *Sherbert* and *Thomas* as a matter of relevant state law. However, if, this Court decides to address the federal constitutional issue, it is clear that the present narrow, ceremony based exemption for religious use of peyote by the Native American Church does not substantially affect the State's drug enforcement scheme. If the exemption does not meet the applicable constitutional test as a matter of law, an evidentiary hearing must take place in the appropriate forum before the federal constitutional issue is decided.

Respectfully Submitted,

Craig J. Dorsay
DIRECTOR, NATIVE AMERICAN
PROGRAM
OREGON LEGAL SERVICES
Counsel of Record for Respondents

APPENDIX A

STATE OF MINNESOTA, Plaintiff

V.

ELI A. HERSHBERGER, et al., Defendants

No. C9-88-2623
Supreme Court Minnesota
August 18, 1989.
(Typeset from WESTLAW)
To be reported at: 444 NW 2d 282

Syllabus by the Court

Minnesota Statute § 169.522 (1988), a statute mandating the display of triangular reflective identification emblems on slow-moving vehicles during operation on the public highways, as applied to individuals who entertain sincerely held religious beliefs prohibiting their compliance therewith, violates the rights afforded to them by the Free Exercise Clause of the United States Constitution.

Certified question answered.

Robert R. Benson, Fillmore County Attorney, Preston, and Matthew J. Opat, Assistant General, St. Paul, for plaintiff.

Phillip G. Villaume, Phillip G. Villaume and Associates, St. Paul, and Joseph L. Daly, Howard J. Bogel, Professors of Law, Hamline University School of Law, St. Paul for defendants.

David L. Bishop, David L. Reinschmidt, Oppenheimer, Wolff & Donnelly, Minneapolis, volunteer attorneys, for amicus curiae, Minnesota, amicus curiae, of counsel.

Heard, considered and decided by the court en banc.

KELLY, Justice.

A Minnesota statute (Minn. Stat. § 169.522) (1988) requires slow-moving vehicles to display a fluorescent orange-red triangular sign emblem when being operated on the state's public highways. Appellants, members of the Old Order Amish religion ("The Amish") moved in the district court for dismissal of traffic citations each had received for noncompliance with the statute's display requirement. They claimed that the statute, by subjecting them to criminal penalties for noncompliance with the display requirement, infringed upon their right to freely exercise their religious beliefs which is afforded to them by the First Amendment to the United States Constitution and Article I, Section 16 of the Minnesota Constitution. The trial court rejected their claim, but it did certify the constitutional questions to the court of appeals pursuant to rule 28.03, Minnesota Rules of Criminal Procedure. Upon application from the court of appeals, we accepted accelerated review pursuant to Minn. R. Civ. App. P. 118. We conclude that Minn. Stat. § 169.522, as applied to these appellants, infringes upon rights guaranteed to them by the Free Exercise Clause of the First Amendment of the Federal Constitution. Because that conclusion disposes of this appeal, we do not address appellants' claim that the statute as applied violates the appellants' right to freedom conscience guaranteed to them by Article I, Section 16 of the Minnesota Constitution, but rather reserve that issue for another day. (FN1) We vacate the trial

court's order and dismiss the charges against these appellants.

Each of the 14 appellants resides in Fillmore County, and each is a member of the Old Order Amish religion. A principal tenet of that religion is that its adherents remain separate and apart from the modern world. This concept of separation emanates from Christian Biblical directions to "be not conformed to this world," see Romans 12:2; and "be ye not unequally yoked together with unbelievers," see II Corninthians 6:14, and is embodied in the basic document of the sect – the Articles of Confession. Based on that concept of separation, the Amish travel primarily by horse and buggy. In Fillmore County the buggy style typically used may be described as a four-sided black box, on wheels, drawn by a horse. Some members of the Amish community, although generally subscribing to the sect's concept of separation, are apparently willing to accommodate that concept with the requirement of Minn. Stat. § 169.522. These appellants, however, are unwilling to compromise their belief that the "loud" colors required and the "wordly symbols" the triangular shape represents to them conflicts with the admonitions found in Apostle Paul's Epistles. To them to do so would be putting their faith in "worldly symbols" rather than God. Between February and September 1988, each appellant received a traffic citation for operating a slow-moving vehicle (SMV), one of the black buggies, on the public highway in Fillmore County without displaying the SMV reflectorized triangle emblem mandated, or the alternate black triangular emblem permitted, by Minn. Stat. § 169.522 (1988).

Subdivision 1 (a) of the statute requires that when operated on a public highway, a slow-moving vehicle must display an orange-red fluorescent triangular emblem. Under limited circumstances, subdivision 1(b) of the statute authorizes the Commissioner of Transportation to issue permits to display, instead, a dull black triangle with a white reflective border plus 72 square inches of permanent red reflective tape. Even though an operator possesses a permit, he or she must also carry a "regular" orange-red emblem in the vehicle which must be displayed externally during times of darkness or low visibility. (FN2) Pursuant to the statute, the Commissioner promulgated Minn. Rule 7440.0350. (FN3) The rule generally limits issuance of permits to those whose religious beliefs preclude them from compliance with the "regular" display requirements of the statute.

We address the Free Exercise Clause claim by observing that the United States Supreme Court has considered three factors to predominate in an evaluation of a Free Exercise Clause Claim: (1) Is the objector's claim based on a sincerely held religious belief? (2) Does the government regulation burden the exercise of that religious belief? and, (3) Is the burden justified by a compelling state interest, which cannot be served by a less intrusive alternative? See, e.g., *Thomas v. Review Bd. of Indiana Employment Sec.*, 450 U.S. 707, 713-19, 101 S.Ct. 1425, 1429-33, 67 L.Ed. 2d 624 (1981). In the instant case, the trial court's analysis of appellants' Free Exercise Clause claim commenced with, and appears to be based upon, its conclusion that these specific Amish appellants did not have a sincerely held religious belief because "the matter of religious belief reflects the individual choice of personal

Amish and not a sincere belief held by the community as a whole." These appellants argue that the trial court improperly constricted "the sincerely held belief" requirement by adding thereto that to be "sincere" the belief must be shared by the religious community as a whole. The state, of course, urges that we affirm the trial court's construction. (FN4)

(1) Our research has revealed no relevant case of the United States Supreme Court in which it has ever required one who asserts a violation of rights under the Free Exercise Clause of the First Amendment, as applied to the states through the Fourteenth Amendment, to demonstrate that the sincerity of his or her belief comports with a religious tenet or principle uniformly and sincerely held by a religious community of which he or she is a member. Indeed, its holdings relating to the specific issue, so far as we have been able to ascertain, have uniformly rejected similar contentions when advanced in cases involving Free Exercise Clause rights. For example, in *Thomas*, 450 U.S. at 714, 101 S.Ct. at 1430, the Supreme Court specified that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Rather, the Court explained, the focus is on whether the one claiming the right individually has a sincere religious belief.

We see, therefore, that *Thomas* drew a line, and it is not to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs.

Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation. *Id.* at 715-16, 101 S.Ct. at 1430-31. (Emphasis supplied). See also *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1986) (Both cases were denial of unemployment compensation by states where the challenger refused Saturday work because of religious beliefs). More recently in *Frazee v. Illinois Dep't of Employment Sec.*, ___ U.S. ___ , 109 S.Ct. 1514, 103 L.Ed.2d 914 (1989), the Supreme Court expressly rejected identical assertions to those articulated here by the trial court and urged upon us by the state. In *Frazee*, the Illinois Board of Review, the Circuit Court of the 10th Judicial Circuit of Illinois, and the Appellate Court of Illinois, Third District, had all denied *Frazee* unemployment benefits because his claim rested on his "personal professed belief." Specifically the Illinois Appellate Court said "the injunction against Sunday labor must be found in a tenet or dogma of an established religious sect." *Frazee v. Dep't of Employment Sec.*, 159 Ill.App.3d 474, 111 Ill.Dec. 400, 403, 478, 512 N.E. 2d 789,

792 (1987). In rejecting such reasoning, the United States Supreme Court said "Never did we suggest that unless a claimant belongs to a sect that forbids what his job requires, his belief, however sincere, must be deemed a purely personal preference rather than a religious belief." (FN5) *Frazee*, ___ U.S. at ___, 109 S.Ct. at 1517. In the instant case, though the trial court did not make a specific finding, it did implicitly determine that application of the statute infringed upon the personal sincere religious beliefs of appellants although not all in the Fillmore County Amish community adhered to those same beliefs. The fact that at least one of the appellants has already actually suffered jail incarceration, and that the others have persistently expressed a willingness to do so rather than comply with the statute, must assuredly buttress that implicit finding that the appellants individually possessed a personal sincerity of belief. *Sherbert, Thomas, Hobbie, Frazee*, were all cases where an individual challenger claimed denial of unemployment compensation for refusal to engage in employment which allegedly infringed upon his or her rights under the Free Exercise Clause. In none of those cases did the United States Supreme Court require that the claimant's belief be shared by the community as a whole. We perceive no reason why an analysis which is valid for unemployment compensation purposes should be less valid when employed to ascertain the existence of a sincere religious belief in the context of criminal proceedings. Therefore, we hold that these appellants have met the initial test enunciated in *Thomas* by establishing that their sincerely held religious beliefs protected them from displaying the

reflectorized emblem or the alternates required by the statute.

(2) We turn next to consider whether, under the second factor of the *Thomas* test, application of the statute burdens the exercise of the appellants' religious beliefs. Without question, it does. In both *Thomas* and *Hobbie* the United States Supreme Court held that because each claimant had been "forced to choose between fidelity to religious belief and . . . employment; the forfeiture of unemployment for choosing the former over the latter brings unlawful coercion to bear on the employee's choice." *Hobbie*, 480 U.S. at 144, 107 S.Ct. at 1051. Surely, if the infringement of rights under the Free Exercise Clause is substantiated when the consequence involves merely temporary deprivation of unemployment compensation, the potentiality, if not the certainty, of criminal sanctions including fines or jail time equally and substantially infringes upon the rights these appellants enjoy in the free exercise of their religious beliefs under the First Amendment. *See*, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). Even in *Bowen v. Roy*, 476 U.S. 693, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986), wherein the United States Supreme Court denied a claimant's challenge because it found the burden caused by the requirement of the use of a social security number with respect to qualification for AFDC benefits to be indirect and incidental, the court said "we cannot ignore the reality that denial of such benefits by a uniformly applicable statute neutral on its face is of a wholly different, less intrusive nature than affirmative compulsion or prohibition, by threat of penal sanctions, for conduct that has religious implications." *Id.*, at 704, 106 S.Ct. at 2154. Here, the burden on these Amish appellants is substantial. They face a choice of either adhering to their religious beliefs by refusing to adopt "worldly symbols" bearing "loud colors" and suffering the consequent criminal sanctions therefore, or rejecting those beliefs in order to comply with the SMV statute.

Even though a challenger who asserts a Free Exercise claim has succeeded in establishing the existence of a sincerely held belief and that the state's action has substantially burdened the Free Exercise Clause right, the third requirement of a *Thomas* analysis involves an inquiry into whether the burden is justified by a compelling state interest which cannot be served by a less intrusive alternative. For example, in *Sherbert v. Verner* the Court required the state to demonstrate a compelling interest, and "that no alternative forms or regulation would (serve the state's interest) without infringing on First Amendment rights." *Sherbert*, 374 U.S. at 406-07, 83 S.Ct. at 1796. The Supreme Court of the United States has adhered to the compelling interest – least restrictive alternative test likewise in later cases. *See Yoder*, 406 U.S. at 215, 92 S.Ct. at 1533 (only those interests of a "highest order" can infringe on religious beliefs); *Hobbie*, 480 U.S. at 140-41, 107 S.Ct. at 1049 (compelling state interest). (FN6)

The trial court found that the "safety and welfare of all persons using our public highways outweighs and overrides the objection to using the SMV sign . . . ." The appellants argue that such a finding lacks any evidentiary support, because, in fact, the state presented no evidence to support the public safety issue claimed.

The state interest claimed here, of course, involves public safety to all who travel on the state's highways. Admittedly, the state presented no evidence of accident incidence involving vehicles displaying the SMV emblem as contrasted with that of those not displaying it. The evidence on the issue consisted, in essence, of acknowledgement by "experts" in the course of testimony that the statutory SMV emblem is almost universally recognized nationwide as designating a slow-moving vehicle, plus some nonspecific anecdotal claims of residents of Fillmore County of dangers associated with encounters involving Amish vehicles on the highway.

(3) Although we have reservations as to whether the evidence actually presented by the state in the trial court was quantatively or qualitatively sufficient to establish a compelling state interest, highway safety, for the purpose of addressing appellants' challenge to the statute in this case we judicially notice that the state's concern for safety of the public using the highways, including these appellants, is a legitimate compelling state interest.

(4) Thus, the question of the existence of a less restrictive alternative remains. The state argues that Rule 7440.0530 provides a less restrictive alternative. We agree with the appellants that it does not. At best, the rule only partially eases the statutory burden on the Free Exercise rights of the appellants. While the rule does authorize the issuance of permits to operators allowing the use of alternate emblem plus 72 square inches of permanently affixed red tape, an operator of a SMV is not in compliance with the statute unless, additionally, during the daylight hours, the vehicle contains a "regular" emblem, nor at night or in foul weather, unless that "regular" emblem is externally displayed on the vehicle in addition to the red reflectorized tape. Moreover, even the alternative provided by Minn.Stat. § 169.522, subd. 1(b), when authorized by a permit issued pursuant to Minn. Rule 7440.0350, is burdensome to the religious beliefs of these appellants who shun "worldly ways." The alternate requirement that a black triangular sign be displayed during daylight hours and, as well, that permanently affixed red reflective tape be employed is no less anathema to the appellants and considered by them to be a burden on their personal religious beliefs than the "regular" statutory requirement of display of the emblem as provided in section 169.522, subdivision 1(a). Additionally, as appellants point out, the alternate SMV emblem fails to provide more warning of the presence of a SMV on the highway to motor vehicular traffic than does the black square horse-drawn buggy itself, moving at less than prevalent highway speeds for motorized vehicles.

Furthermore, appellants note, state and county authorities have posted highway traffic signs depicting a black horse and buggy configuration in areas where Amish horse-drawn buggies are commonly encountered. The record contains no evidence which supports any conclusion that the display of the statutory alternate emblem during daylight hours provides an alternative less restrictive and less burdensome on appellants' First Amendment Free Exercise Clause rights.

(5) Furthermore, at night, and during foul weather, the display requirements of the statute are more onerous to those who, like these appellants, harbor the personal belief that their religion forbids compliance, than upon

those who do not share such beliefs. At night, in addition to being required to display the "regular" emblem they must likewise display 72 square inches of red reflectorized tape. The appellants here assert that since they do not object on religious grounds to outlining boxes of their buggies with silver reflective tape – a color they consider acceptable because not "loud" – or to displaying red lit lanterns as a supplement to the silver reflective tape, that there does exist a less restrictive alternative to serve the state's public safety concerns. They further point out that testimony at the hearing established that the sliver reflectorized tape was at least as bright, if not brighter than that outlining either triangular emblem mandated by the statute. The state contends its public safety concern is enhanced by the general recognition by the public of the orange-red triangular emblem as designating a SMV. The appellants counter by noting that the state itself has created an exception to that desired uniformity, when, by section 169.522, subdivision 1(b), it has permitted in certain circumstances an alternative display (the black triangle-red reflectorized tape), which, though personally equally objectionable to appellants on religious grounds, is of questionable superiority on public safety grounds to the alternative suggested by appellants.

We conclude that the state's public safety interest would not be significantly diminished were it to permit the use at night of silver tape used in connection with the display of lighted red lanterns by these appellants, and by those entertaining religious beliefs similar to those of these appellants, and that, therefore, it has failed to establish that a less restrictive alternative would not serve its public safety concerns.

(6) Accordingly, we hold that these appellants have established that each has a sincerely-held religious belief that forbids him from displaying the SMV emblems required by Minn.Stat. § 169.522; that the state enforcement of Minn.Stat. § 169.522 which subjects these appellants to criminal prosecution, with resultant potential fines or jail incarceration, burden the appellants rights under the Free Exercise Clause; that the state has a compelling public safety interest which Minn.Stat. § 169.522 seeks to serve; but that the state's compelling public safety interest can be served by a less restrictive alternative; and that, therefore, Minn.Stat. § 169.522 as applied against these appellants violates the Free Exercise Clause of the First Amendment to the United States Constitution. Therefore, we answer the first certified question in the affirmative.

Having so concluded, it is unnecessary for us to consider the second question certified by the trial court which asks whether Minn.Stat. § 169.522 as applied to these defendants violates Article I, Section 16 of the Minnesota Constitution. Therefore, we do not address that issue, and express no opinion on the issue posed, reserving its consideration to a later date in a different case.

The decision of the court denying the motion of these appellants to dismiss all pending charges is vacated, and those charges are hereby dismissed.

FN1. The issues raised by the constitutional questions certified relate to whether the statute, as applied, infringes upon the rights afforded appellants under the Free Exercise Clause of the First Amendment to the United States Constitution or Article I, Section 16 of the Minnesota Constitution. Amicus Minnesota Civil Liberties

Union filed a brief in which it did not directly address the issues raised by the certified questions, but rather focused upon arguments under the Establishment Clause. Ordinarily, when questions have been certified, briefs of amici should address issues raised by the questions. Since appellants do not raise an Establishment Clause argument, we do not address it in this opinion.

FIN2. Relevant provisions of the statute are:

Subdivision 1. (a) All animal-drawn vehicles, . . . implements of husbandry and other machinery, . . . which are designed for operation at a speed of 25 miles per hour or less shall display a triangular slow-moving vehicle emblem . . . . The emblem shall consist of a fluorescent yellow-orange triangle with a dark red reflective border and be mounted so as to be visible from a distance not less than 600 feet to the rear. . . . After January 1, 1975, all slow-moving vehicle emblems sold in this state shall be so designed that when properly mounted they are visible from a distance of not less than 600 feet to the rear when directly in front of lawful lower beam of head lamps on a motor vehicle. . . . .

(b) An alternate slow-moving vehicle emblem consisting of a dull black triangle with a white reflective border may be used after obtaining a permit from the commissioner under rules of the commissioner. A person with a permit to use an alternate slow-moving vehicle emblem must:

(1) carry in the vehicle a regular slow-moving vehicle emblem and display the emblem when operating a vehicle between sunset and sunrise, and at any other time when visibility is impaired by weather, smoke, fog, or other conditions; and

(2) permanently affix to the rear of the slow-moving vehicle at least 72 square inches of reflective tape that reflects the color red. Minn.Stat. § 169.522, subd. 1 (1988).

FN3. Minn.Rule 7440.0350 provides:

Subpart 1. Conflicting beliefs. Persons who have sincerely held religious beliefs prohibiting their use of the standard SMB emblem may apply for a permit to display the alternate SMV emblem.

Subpart 2. Application. Applications for permits to display the alternate SMV emblem must be made on an application form prescribed by the commissioner. The application must contain a statement of the conflicting religious principles or tenets on which the appellant's objection to the display of the standard SMV emblem is based.

Subp. 3. Permit use requirements. The alternate SMV emblem may be used only on animal-drawn vehicles. A person operating a vehicle displaying the alternate SMV emblem must have in possession in the vehicle a permit or copy of a permit to display the alternate SMV emblem. A permit is not transferable and may not be used by persons other than employees or immediate household members of the family of a person who has obtained a permit. The permit must be displayed to a peace officer upon request.

Subp. 4. Permit life. A permit for the display of the alternate SMB emblem is valid for a period of four years. Subp. 5. Appeal. The decision granting or denying permit requests must be in writing and must set forth the reasons for the action. A person whose application is denied may request a contested case hearing to review the denial, by writing to the commissioner of public safety.

FN4. The state relies on evidence that the practice of individual members of the Amish community may differ with respect to their attitude toward, and the actual display of, SMV signs on their vehicles. Indeed, the record contains evidence that not all adherents of the Amish community regard the display of the orange-red reflectorized triangular emblem as a violation of the precepts of the Amish religion. However, as later explained, what is relevant to the inquiry is the sincerity of the belief of the individual raising the Free Exercise Clause, not the general acceptance or the belief by all the religious community.

FN5. In *Quaring v. Peterson,* 728 F.2d 1121, 1124-25 (8th Cir. 1984), aff'd by an equally divided Court sub nom. *Jensen v. Quaring,* 472 U.S. 478, 105 S.Ct. 34492, 86 L.Ed. 383 (1985), the one claiming a Nebraska statute which required a driver's photograph on a state issued driver's license unconstitutionally infringed on her rights guaranteed by the Free Exercise Clause was found to have possessed a sincere religious belief notwithstarding that other members of her church did not adopt her interpretation of the Christian Bible. See also L. Tribe, American Constitutional Law, § 14-12 at 1245-46 (2d ed. 1988). "The perception of the claimant's sincerity inevitably reflects the fact finder's view of the reasonableness of the claimant's beliefs. . . . (t)he very rights ostensibly protected by the free exercise clause might well be jeopardized by any but the most minimal inquiry into sincerity."

FN6. Some suggestion has been advanced that the United States Supreme Court has recently diminished the state burden by broadly defining the state's interests and by lowering the accommodation requirement by its decisions in *Goldman v. Weinberger,* 475 U.S. 503, 106 S.Ct. 1310,

89 L.Ed.2d 478 (1986) and *United States v. Lee,* 455, U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982). *See, L. Tribe, supra,* § 14-13 at 1261. Professor Tribe suggests, however, that the lowered burden for the state is reversed for situations where government actions burden religious choices only incidentally, whereas the stricter and higher standards are reserved for and applicable to situations where government action compels the individual to choose between religious beliefs and government benefits or avoidance of criminal sanctions. *See, L. Tribe, supra,* § 14-13 at 1262-63.

APPENDIX B

Department of Human Resources
EMPLOYMENT DIVISION
875 Union Street N.E.,
Salem, Oregon 97311

August 20, 1984

Received
August 20, 1984
E A B

In Reply
Refer To:
PSV:FR:UI 7
R D84-E-1181
EXP 09-85

Employment Appeals Board
1675 Winter St. NE
Salem, OR 97303

RE: Alfred L. Smith
SSA: 542 30 4961

This represents the Employment Division's argument in the case of Alfred L. Smith.

The Division believes that the referee lacked the jurisdiction to hold that the claimant was not disqualified while holding that the claimant was discharged for misconduct connected with his work. The referee's decision is that ORS 657.176 requires a disqualification, but the U.S. Constitution does not allow imposition of the disqualification. It is our position that the referee's jurisdiction was limited to Employment Division law. Additionally, we believe that even if the referee may consider questions of constitutionality, we lacked notice that he was going to do so.

The referee was limited to considering Employment Division law by OAR 471-40-025(8). The referee specifically concludes that he must disregard Employment Division law in this case while considering the U.S. Constitution. However, the referee was limited to considering whether the claimant's constitutional rights might well bear on whether his actions could be misconduct. However, the referee cannot conclude that the claimant was discharged for misconduct and not disqualify the claimant.

Even if the referee could consider the U.S. Constitution, the Employment Division was never given notice that that issue was to be heard. The referee notes that "there is no evidence in the hearing record to indicate that granting benefits to claimants whose unemployment is caused by adherance [sic] to religious beliefs would have any significant impact on the trust fund. . ."

Exhibit # 8
PAGE 23

The Division did not present such evidence as we had no knowledge that that issue was being considered. The Notice of Hearing specifically indicates that the issue being addressed was ORS 657.176. OAR 471-40-025(8) provides that " . . . in no event shall the referee accept jurisdiction of a new issue and proceed with hearing on such issue when an interested party to such new issue has not waived right to notice." The Division, a party to the hearing, never waived right to notice of the interjection of a new issue, that is can a claimant be discharged for misconduct for benefits under ORS 657.176, but be paid benefits pursuant to the U.S. Constitution.

Based on the above, we believe the referee's decision should be set aside and the claimant eligibility be determined under Employment Division law only. If the Board concludes that the referee had authority to rule outside Employment Division law, the matter ought to be remanded for a hearing following proper notice to the parties of the issues to be heard so that the Division has an opportunity to present the information the referee indicates is so crucial.

Sincerely,

Frank Richey, Manager
Program Services

FR:ds

cc: Alfred L. Smith
David Morrison, Attorney
Oregon Legal Services
Eldon F. Caley, Attorney

ITEM # 8
PAGE 24

AMICUS CURIAE

BRIEF

No. 88-1213 ④

Supreme Court, U.S.
FILED
JUN 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF OREGON, W.E. HUNTER, ADMINISTRATOR,

Petitioners,

v.

ALFRED L. SMITH, GALEN W. BLACK, AND ADAPT,

Respondents.

BRIEF *AMICUS CURIAE* OF THE AMERICAN JEWISH CONGRESS IN SUPPORT OF RESPONDENTS

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76

TABLE OF CONTENTS

Table of Authorities i

Interest of the *Amicus* xiv

Summary of Argument. 1

Argument 8

I. THE STATE OF OREGON BURDENED RESPONDENTS' RELIGION WHEN IT DENIED THEM UNEMPLOYMENT BENEFITS BECAUSE OF CONDUCT MANDATED BY RELIGIOUS BELIEF 8

II. THE FREE EXERCISE CLAUSE PROTECTS THE RIGHT OF NATIVE AMERICAN CHURCH MEMBERS TO USE PEYOTE IN RELIGIOUS CEREMONIES . . . 14

- A. The State Must Demonstrate A Compelling Interest in Refusing to Accommodate A Religious Practice. . . . 23
- B. The State Has Not Proven Accommodation Would Endanger Native American Church Members 33
- C. The State Has Not Proven Accommodation Would Significantly Impede Drug Enforcement 45

Conclusion 59

Table of Authorities

Cases

Benjamin v. Coughlin,
708 F.Supp. 570
(S.D.N.Y. 1989) 49

Bob Jones University v. United States,
461 U.S. 574 (1983) 46

Boos v. Barry.
108 S.Ct. 1157 (1988) 41

Bowen v. Roy,
476 U.S. 693 (1986) . . . . . 24 ,25
26, 31

Cantwell v. Connecticut,
310 U.S. 296 (1940) 26

Commonwealth v. Nissenbaum,
404 Mass. 575,
536 N.E.2d 592 (1989) 52, 53

Employment Division v. Smith,
108 S.Ct. 1444 (1988) 11, 12
13

Fellowship Baptist Church, v. Benton
815 F.2d 485
(8th Cir. 1987) 22

Frazee v. Illinois Department of Employment Security,
109 S.Ct. 1514 (1989) 9, 14

Gillette v. United States,
401 U.S. 437 (1971) 48

Goldman v. Weinberger,
475 U.S. 503 (1986) 46

Hawaii v. Blake
695 P.2d 336
(Haw. App. 1985). 50

Hernandez v. C.I.R.,
No. 87-963,
(June 5, 1989) 9

Hobbie v. Unemployment Appeals Commission,
480 U.S. 136 (1987) 8, 9, 11, 14, 28, 47

Johnson v. Charles City Community School Board,
368 N.W. 2d 74 (Iowa),
cert. denied,
474 U.S. 985 (1985) 22

Larson v. Valente,
456 U.S. 228 (1982) 46

Leary v. United States, 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969) 50

Lewellyn v. State, 592 P.2d 538 (Okl. Cir. 1979) 53

Lyng v. Northwest Indian Cemetery Protective Association, 108 S.Ct. 1319 (1988) 19, 50

Morton v. Mancari, 417 U.S. 535 (1974) 56, 57

National Treasury Employees Union v. Von Raab, 109 S.Ct. 1384 (1989) 58

Native American Church of New York v. United States, 468 F.Supp 1247, (S.D.N.Y. 1979), *aff'd mem.*, 633 F.2d 205 (2d Cir. 1980) 35

Olsen v. State of Iowa, 808 F.2d 652 (8th Cir. 1986) 53

People v. Collins,
273 Cal. App. 2d 486,
78 Cal. Rptr. 251 (1969) . . 50

People v. Torres,
133 Cal. App. 3d 265,
184 Cal. Rptr. 39 (1982). . . 53

People v. Woody,
61 Cal. 2d 716, 40
Cal. Rptr. 69,
394 P.2d 813 (1964) 40, 49, 51

Peyote Way Church of God, Inc. v. Meese,
698 F.Supp. 1352
(N.D. Tex. 1988). 37, 51

Schneider v. New Jersey,
308 U.S. 147 (1939) 26

Sherbert v. Verner,
374 U.S. 398 (1963) 8, 9, 11, 14, 25, 45, 47

Sheridan Road Baptist Church v. Department of Education.
426 Mich. 462,
396 N.W.2d 373 (1986),
cert. denied,
481 U.S. 1050 (1987). 22

Smith v. Employment Division,
301 Or. 209,
721 P.2d 445 (1986) 12, 13

Smith v. Employment Division,
307 Or. 68,
763 P.2d 146 (1988) 11

State ex rel Douglas v. Faith Baptist Church,
305 N.W. 2d 571
(Neb. 1981) 22

State ex rel Swann v. Pack,
527 S.W. 2d 99 (Tenn 1975),
cert. denied,
424 U.S. 954 (1976) 43

State v. Big Sheep,
75 Mont. 219,
243 P. 1067 (1926). 46

State v. Brashear,
92 N. Mex. 622, 593
P.2d 63 (1979). 50, 51
53

State v. Bullard,
207 N.C. 599, 148
S.E. 2d 565 (1967). 40

State v. Olsen
315 N.W. 2d 1
(Iowa 1982) 53

State v. Patzer,
382 N.W.2d 631
(N. Dak), *cert. denied,*
479 U.S. 825 (1986) 22

State v. Riddle,
285 S.E. 2d 359
(W. Va. 1981) 22

State v. Shaver,
294 N.W. 2d
883 (N. Dak. 1980) 22

State v. Whittingham,
19 Ariz. App. 27,
504 P.2d 950 (1973) 40, 49, 51

Thomas v. Review Board,
450 U.S. 707 (1981) 8, 9, 11, 14, 24, 45, 47

Town v. Florida,
377 So.2d 648 (Fla. 1979) . . 53

United States v. Antelope,
403 U.S. 641 (1977) 56, 57

United States v. Lee,
455 U.S. 252 (1982) 24, 46
48

United States v. Rush,
738 F.2d 497
(1st Cir. 1984),
cert. denied,
470 U.S. 1004 (1985). 56

Vermont v. Rocheleau,
142 Vt. 61, 451
A.2d 1144 (1982). 50, 53

Whitehorn v. State.
561 P.2d 539
(Okla. Crim. App. 1977) . . . 40

Whyte v. United States,
471 A.2d 1018
(D.C. App. 1984). 50

Wisconsin v. Yoder,
406 U.S. 205 (1972) 21, 22
24, 25
31, 32
47, 48

Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986) 28

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) 27

Constitution, Statutes, and Regulations

U.S. Const., Amend I . . . . *passim*

21 C.F.R. §1307.31 (1988). . . . 35, 36

25 C.F.R. 11.87 (H) (1988) . . . 37

52 Fed. Reg. 35674-01 (Sept. 22, 1987) 37

52 Fed. Reg. 2452-01, (Jan. 22, 1987) 37

American Indian Religious, Freedom Act, 42 U.S.C. §1996 (1988). . . . 19, 37 38

Ariz. Rev. Stat. Ann., §13-3402 (B)(1-3) (1988). . . 40

Colo. Rev. Stat.,
§12-22-317(3) (1985) 40

Controlled Substance Act,
21 U.S.C. §801(2) (1988) 34

Controlled Substance Act,
21 U.S.C. §812(c) (1988) 35

Controlled Substance Act,
21 U.S.C. §841(a) (1988) 34

Drug Abuse Control Amendments
of 1965,
79 Stat. 226 §3(a). 35

Iowa Code Ann.,
§204.204(8) (1987). 40

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§65-4116(8) (1985). 40

Minn. Stat. Ann. §152.02
(West 1989) 40

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§94-35-123 (1947) 40

N.J.A.C. 8:65-8.12
(Supp. 1986). 40

Nev. Rev. Stat. Ann.
§453.541 (1987) 40

N.Mex. Stat. Ann.
§30-31-6(d) (Supp. 1988). . . 40

Or. Rev. Stat.,
§475.035 (1985) 42

S.D. Cod. Laws Ann.
§34-20B-14 (17) (1986). . . . 40

Tex. Rev. Civ. Stat. Ann.,
art. 4476-15 §4-11(a)
(Vernon Supp. 1989) 40

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(1988). 40

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96 Yale L.J. 943 (1987) . . . 26, 30

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Barsh, *The Illusion of Religious Freedom for Indigenous Americans*, 65 Or. L. Rev. 363 (1986) . .	16, 7
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Cohen, *Handbook of Federal Indian Law* (1982 ed.)	15, 16
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111 Cong. Rec. 15977 (1965). . .	35
DEA Order, *In the Matter of Petition of Carl E. Olsen For the Ethopian Zion Coptic Church For An Exemption From the Controlled Substances Act*, No. 86-1442 (July 26, 1988). . .	55, 56

Drug Abuse Control Amendments of 1970, Hearings before the Subcommittee on Public Health and Welfare of the Committee on Interstate and Foreign Commerce, House of Representatives, 91st Cong., 2d Session (1970) 36

1978 U.S. Code Cong. & Admin. News 1262 *et*. *seq*. . . 19, 20 38, 39

1980 Census, Table 62, General Population Characteristics 40

Hagen, *Indian Police & Judges, Experiments in Acculturation & Control* (1986) 15

1985 National Household Survey on Drug Abuse, conducted by the National Institute on Drug Abuse (NIDA) 54, 55

Pepper, *Taking the Free Exercise Clause Seriously*, 2 B.Y.U.L. Rev. 299 (1986). . 30

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INTEREST OF THE AMICUS

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, economic and political rights of American Jews and all Americans. It is committed to the preservation of the great freedoms secured by the First Amendment to the Constitution, especially the rights secured by the Establishment and Free Exercise Clauses.

As an organization representing a religious minority, AJCongress is concerned that the power of government not be used arbitrarily to suppress easily accommodated free exercise of religion. In particular, AJCongress seeks to ensure that the religious practices of minority religions are not burdened or prohibited absent compelling justification.

To further these ends, AJCongress has filed briefs amicus curiae in numerous cases in this Court and in other state and federal courts in which the meaning of the religion clauses has been at issue. AJCongress filed an amicus brief in Employment Division v. Smith, 108 S.Ct. 1444 (1988).

This brief is submitted with the consent of the parties.

SUMMARY OF ARGUMENT

1. Native Americans have had a long experience with governmental intolerance, even active persecution, of their tribal religions. In the late 19th century, the federal government set out to assimilate Native Americans -- to achieve the "Christianization" of the Indian race. Native American ceremonial dances and other tribal rites were explicitly outlawed. Attempts also were made to ban the religious use of peyote, considered by some Native Americans to be a sacred representation of the diety.

Fortunately, policy changed and in the 1930's an effort was made to extend the protections of the First Amendment to Native Americans. In 1978, with the American Indian Religious Freedom Act, Congress publicly proclaimed that it is now official United States policy to protect the right of Native Americans to freely "worship through ceremonials and traditional rites."

The State of Oregon disagrees with this policy. Because of the drug crisis that has confronted our nation, a crisis that is patently unrelated to the ceremonial use of peyote by Native Americans, it contends that a Native American religious practice must again be banned. Illegal drug use is so pervasive, the State claims, it cannot exempt Native American Church members from laws prohibiting the use of peyote. If it does, it says, countless other people claiming religious reasons for their drug use will be entitled to similar exemptions.

But this case is not about the claims of other religious adherents who seek to use drugs other than peyote, claims that are often of doubtful sincerity. It is only about Native American religious peyote use. And the State has failed to demonstrate precisely how exempting Native American peyotism from its drug laws would seriously undermine a compelling state interest.

2. The State argues, without much conviction, that peyote use is dangerous regardless of its motivation, and that the "health and well-being" of Native Americans would be jeopardized if it granted Native Americans a religious exemption. Yet the State has failed to put in any evidence, other than footnoted tidbits of information about peyote use in general, that shows that ceremonial peyotism is so harmful to Native American Church members it cannot be allowed. Indeed, the only evidence before this Court on the effects of peyote are the affidavits introduced by respondent Smith at his hearing, which convincingly

demonstrate that the religious use of peyote has proven beneficial to members of the Native American Church.

If ceremonial peyote use truly was inevitably harmful, it is likely that all jurisdictions would ban it. Yet the opposite is true. The federal government has exempted Native American religious peyote use from its drug laws for more than 25 years. At least fifteen states, where the Native American Indian population is centered, have similar statutory or judicial exemptions. The State has not shown that the Native Americans in these jurisdictions have suffered any adverse consequences because they are allowed to engage in a sacred rite without fear of penalty.

4. The State also contends that were it to allow peyote use by Native American Church members, it would be forced to exempt all religious use of all drugs,

thus undermining its entire drug enforcement scheme. This all-or-nothing argument misconceives the nature of an accommodation mandated by the Free Exercise Clause. When an entire religion is in effect outlawed by a governmental rule or policy, a request for an exemption involves a careful balancing of this danger against the precise harm to the state's interest if an exemption were granted. The balance between religion and the state interest will not tip the same way in every case.

Peyote is more than a sacrament of the Native American religion -- it is the basis of the religion itself. If the religious practice is prohibited, the religion dies. No graver danger can be imagined. It is doubtful that any other religious adherents who have sought religious exemptions from drug laws would suffer similar harm. In most other cases, the religious use of drugs is an aid to religious experience; rarely, as with peyote, is it the essence of the religion itself.

Moreover, the Native American Church carefully controls use of peyote -- use outside of a religious ceremony is sacrilegious. The potential for abuse is very limited. In contrast, others who have sought exemptions have admitted that their use of drugs is constant, unsupervised, uncontrolled. Often even children are permitted to partake of the drug. The potential for abuse is very great.

There are also differences in the likelihood that an exemption would prompt fraudulent claims. Peyote use is very rare in this country, probably because it is unpleasant tasting and often causes nauseau and vomiting. It is highly unlikely that many people would fake religious belief to qualify for a peyote exemption. Marijuana, on the other hand (the drug at issue in virtually all other claims for religious exemption), is an enormously popular drug. Over 15,000,000 pounds of marijuana were seized by the DEA in the seven year period between 1980 and 1987. During the same period, only 19 pounds of peyote were similarly seized. Obviously, far more people would seek an exemption for marijuana use, and far more of those claims are likely to be fabricated.

Finally, Native Americans occupy a _sui generis_ legal status. Their special status sometimes disadvantages them; but sometimes it entitles them to special benefits. Since a ban on peyote would do no less than destroy an entire Native American religion, the _sui generis_ status of Native Americans should permit preferential treatment in this case.

I

THE STATE OF OREGON BURDENED RESPONDENTS' RELIGION WHEN IT DENIED THEM UNEMPLOYMENT BENEFITS BECAUSE OF CONDUCT MANDATED BY RELIGIOUS BELIEF

For more than a quarter of a century, this Court has recognized that government burdens religion when it denies a benefit to an individual because of conduct mandated by religious belief. Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Board, 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Commission, 480 U.S. 136 (1986).[1] Indeed, just a few months ago, the Court unanimously reaffirmed this rule, holding that a state could not deny unemployment benefits to an individual who refused, because of his religious beliefs, to work on Sunday, even though he did not claim membership in a Christian denomination whose tenets prohibited Sabbath work. Frazee v. Illinois Department of Employment Security, 109 S.Ct. 1514 (1989). See also Hernandez v. C.I.R., No. 87-963 (June 5, 1989).

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[1] Both Sherbert and Hobbie involved Seventh Day Adventists who were fired for refusing to work on the Sabbath and who were then denied unemployment benefits. Thomas involved a Jehovah's Witness who refused, for religious reasons, to accept a transfer to a job requiring work with armaments. In each case, the Court held that the denial of benefits infringed the plaintiffs' free exercise rights because

In each of these cases, the Court interpreted the Free Exercise Clause of the First Amendment to protect individuals who are forced to choose between complying with a job requirement or engaging in a practice mandated by their

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they were being forced "to choose between following the precepts of [their] religion and forfeiting benefits on the one hand, and abandoning one of the precepts of [their] religion in order to accept work, on the other hand." Sherbert, 374 U.S. at 404; Hobbie, 480 U.S. at 144.

religion. In this case, respondents Alfred L. Smith and Galen W. Black ("respondents"), members of the Native American Church, were unable to comply with their employer's requirement that they totally abstain from the use of mind-altering drugs. To do so, they would have to renounce their church's most sacred practice -- the ritual use of peyote.

Peyote, a cactus plant that contains the hallucinogen mescaline, is a sacrament of the Native American Church, and respondents, active members of their Church, felt obligated to participate in a religious ceremony involving the ingestion of peyote. When they informed their employer, the Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment ("ADAPT"), that they had used peyote at a religious ceremony, they were discharged for violating ADAPT's alleged policy prohibiting even the religious use of certain drugs.

The State of Oregon then sought to impose an additional burden on respondents. That burden was indirect -- respondents were not prosecuted for their religious use of peyote although the State has maintained that their use of the substance was illegal. Rather, the State Employment Division denied them unemployment benefits on the ground that they had been "discharged for misconduct connected with work."

The Oregon Supreme Court reversed, reasoning that Sherbert and Thomas[2] controlled respondents' claims and that the Free Exercise Clause required that they be granted benefits. Smith v. Employment Division, 301 Or. 209, 721 P.2d 455 (1986). A majority of this Court disagreed. According to the Court,

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[2] Hobbie had not yet been decided.

Sherbert and its progeny were not dispositive because in those cases the claimants' religious conduct was not prohibited under state law. Employment Division v. Smith, 108 S.Ct. 1444 (1988). A state could refuse unemployment benefits to an individual who had engaged in illegal conduct, even if religiously motivated, provided the conduct was not otherwise protected by the First Amendment.[3]

The Court then remanded the case for a determination of whether respondents' conduct was in fact illegal under Oregon law. On remand, the Oregon Supreme Court held that the Oregon statute prohibiting possession of controlled substances "makes no exception for the sacramental use of peyote." Smith v. Employment Division, 307 Or. 68, 72-73, 763 P.2d 146, 148 (1988) (per curiam).[4] Nevertheless, the Oregon Court concluded that religious peyote use by Native American Church members was protected by the First Amendment.[5]

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[3] As Justice Stevens wrote, "if a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct." 108 S.Ct. at 450 (emphasis added).

This Court must now decide whether "the ingestion of peyote for sincerely held religious reasons is a form of conduct that is protected by the Federal Constitution from the realm of the State's criminal laws." Smith, 108 S.Ct. at 1451. For if it is, respondents faced the same dilemma that confronted the claimants in Sherbert, Thomas, Hobbie and Frazee, and the State's decision to deny them unemployment benefits for choosing to adhere to their religious beliefs plainly violated the Free Exercise Clause of the First Amendment.

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[4] The Oregon State Board of Pharmacy was prepared to make this exception until the Attorney General objected. See pps. 41-42 infra.

[5] The Oregon Court did not rule on whether respondents' use of peyote, as opposed to possession, actually constituted an illegal act since to do so would be merely advisory. 307 Or. at 732, 763 P.2d at 148. Thus, it is still open whether these respondents were engaged in what is, in actuality and not just in theory, conduct criminalized by the State.

II

THE FREE EXERCISE CLAUSE PROTECTS THE RIGHT OF NATIVE AMERICAN CHURCH MEMBERS TO USE PEYOTE IN RELIGIOUS CEREMONIES

Native Americans have had a long and bitter experience of governmental intolerance of their religious practices. One hundred years ago, in the period following passage of the General Allotment or Dawes Act,[6] the federal government began a campaign to assimilate Native

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[6] 24 Stat. 388, as amended, 25 U.S.C. §331-58.

Americans into white society. Native American religions. became victims of a federal policy designed to achieve the "Christianization and the development of the Indian race." Cong. Rec. 49th Cong. 2d Sess. (Dec. 15, 1886), reprinted in Report to Congress on American Indian Religious Freedom Act of 1978 (P.L. 95-341) at 5 (1979).

To accomplish its goals, the government established an Indian Police and Courts of Indian Offenses. Both were authorized to enforce a Code of Indian Offenses that expressly outlawed many Native American religious practices.[7] Sacred dances, such as the "sun dance" and the "ghost dance" were prohibited.[8] So were "medicine men" or any

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[7] W. Hagen, Indian Police & Judges, Experiments in Acculturation & Control (1986); F. Prucha, The Great Father (1984); Felix S. Cohen, Handbook of Federal Indian Law 141 (1982 ed.).

[8] **As late as 1921, the Office of**

"who shall use any of the arts of the conjurer to prevent the Indians from abandoning their heathenish rites or customs." Rules of the Court of Indian Offenses, Pine Ridge Reservation, reprinted in M. Price, Law and the American Indian, 139-144 (2d ed. 1983). Other "coercive means of assimilation" included requiring Indian children to attend Christian denominational schools. F. Cohen, Handbook of Federal Indian Law, 140 (1982 ed.).

The military was used to enforce these prohibitions; sometimes the results were catastrophic. The effort to

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Indian Affairs outlawed "the sun dance and all other similar dances and so called religious ceremonies" because they were seen as promoting "illness, danger to health and shiftless indifference to family welfare." Circular No. 1635 (April 26, 1925), reprinted in Report to Congress on American Indian Religious Freedom Act of 1978 (P.L. 95-341) at 6 (1979). See Barsh, The Illusion of Religious Freedom for Indigenous Americans,, 65 Or. L. Rev. 363, 370-371 (1986).

suppress the Sioux Ghost Dance led to the 1890 Wounded Knee Massacre in which the Seventh Cavalry killed 146 Indians. Price, supra, at 81; Barsh, The Illusion of Religious Freedom for Indigenous Americans, 65 Or. L. Rev. 363, 370 (1986).

Not surprisingly, by the turn of the century, attempts were made to outlaw Native American religious peyotism. As the then Commissioner of Indian Affairs proclaimed:

> The information now on hand concerning the physiological and sociological results of the use of this drug is that the office will in every way practicable prevent the Indians from indulging in it further . . . .
> Even if the physiological effects of this drug were not serious, its use would have to be prohibited for the same sociological reasons as have led the Government strongly but tactfully to modify Indian dances.

Prucha, supra, at 786.

These efforts were not ultimately successful largely because of a failure to prove the harmful effects of peyote, Prucha, supra, at 788, combined with a changed federal Indian policy, beginning in the late 1920's, that sought to encourage appreciation and tolerance of Indian religion and culture. Id. at 789. John Collier, appointed Commissioner of Indian Affairs in 1934, mounted an extensive effort to extend constitutional principles of religious liberty to Native Americans. He officially pronounced that "no interference with Indian religious life or ceremonial expression will hereafter be tolerated."[9]

More than forty years after Collier's campaign to extend religious freedom to Native Americans, Congress passed the American Indian Religious Freedom Act of 1978. The Act makes clear that it is United States policy to "protect and preserve" the rights of Native Americans to "believe, express and exercise" their "traditional religions," including their "use and possession of sacred objects" and their "freedom to worship through ceremonials and traditional rites." 42 U.S.C. §1996 (1988).

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[9] Circular No. 2970, January 3, 1934, reprinted in Prucha, supra, at 951.

While the Act does not create any independent legal rights for Native Americans, see Lyng v. Northwest Indian Cemetery Protective Association, 108 S.Ct. 1319, 1328 (1988), it reflects the current view, in sharp contrast to the views of the not too distant past, that the religious practices of Native Americans should be respected even if they are different from or even incomprehensible to the Judeo-Christian ethic. See 1978 Code Cong. & Admin. News

1262 et. seq. In accordance with this view, the federal government and most states that have significant Native American populations have made efforts to accommodate the religious use of peyote by Native American Church members. See pps. 34-41 infra.

Despite this pronounced change in policy towards Native American religious practices, the State of Oregon, still mired in the past, has been engaged in a singleminded effort to suppress the practice of peyotism by members of the Native American Church. With utter disdain for the devastating impact that disallowing peyote use would have on Native American religion, the State asks this Court to approve even criminal penalties against Native Americans who engage in peyotism because to grant them constitutional protection would purportedly "wreak havoc with government's efforts to control dangerous drug use in this country." (State Brief at 21).

According to the State, if Native Americans have a First Amendment right to use peyote at religious ceremonies, each and every individual who asserts a religious justification for drug use would have the same right, regardless of the circumstances of the individual, the religion, or the drug at issue.

But this case is not about whether Ethopian Zion Coptic Church members or Rastafarians must be allowed to grow or use marijuana without restraint. Nor is it about whether Hindus, Tantric Buddhists or Members of the Acquarian Brotherhood Church must be permitted to use LSD or hashish to achieve a higher state of consciousness. This case is no more about those religions than Wisconsin v. Yoder, 406 U.S. 205 (1972), which exempted the Amish from certain compulsory education laws, was about whether fundamentalist Baptist families had the same constitutional right to avoid those laws.[10]

This case is only about a particular sacrament of a particular Native American religion. And, although the State of Oregon would like this Court to gloss over the particulars in this case, the unfortunate history of Native American religions in this country can no more be ignored than can Congress' recent efforts to rectify that history by finally assuring some degree of protection to Native Americans who practice sacred traditional rites.

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[10] Courts throughout the country have declined to exempt fundamentalist Christians from various state education regulations, distinguishing on many different grounds the unique facts surrounding the Amish religion that mandated an exemption in *Yoder*. *See*, *e.g.*, *Fellowship Baptist Church v. Benton*, 815 F.2d 485 (8th Cir. 1987); *State v. Patzer*, 382 N.W. 2d 631 (N. Dak.), *cert. denied*, 479 U.S. 825 (1986); *Sheridan Road Baptist Church v. Department of Education*, 426 Mich. 462, 396 N.W. 2d 373 (1986), *cert. denied*, 481 U.S. 1050 (1987); *Johnson v. Charles City Community Schools*, 368 N.W. 2d 74 (Iowa), *cert. denied*, 474 U.S. 985 (1985); *State ex rel Douglas v. Faith Baptist Church*, 305 N.W. 2d 571 (Neb. 1981); *State v. Shaver*, 294 N.W. 2d 883 (N.Dak. 1980); *State v. Riddle*, 285 S.E.2d 359 (W. Va. 1981).

A. The State Must Demonstrate A Compelling Interest in Refusing to Accommodate A Religious Practice

The State broadly asserts that individuals cannot be allowed, for religious reasons, to violate "laws that serve the common good." (State Brief at 17, n.12). Presumably all laws, in some fashion, "serve the common good," or at least are thought to by those that enact them. Adherence to the State's view, therefore, would eviscerate the Free Exercise Clause -- it would permit no religious exemptions regardless of how harsh an impact a law has on an individual's religious conscience or how minimal an impact an exemption would have on the interests furthered by the law.[11] Fortunately, this Court has not given the Free Exercise Clause so limited a reading.

Instead, this Court has recognized that government cannot burden religious liberty unless it "is essential to accomplish an overriding governmental interest." United States v. Lee, 455 U.S. 252, 257-258 (1982). This Court has described that interest as "compelling"[12] or "especially important"[13] and has recognized that "no showing merely of a rational relationship to some colorable state interest [will] suffice." Sherbert, 374 U.S. at 406.

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[11] In its earlier Brief, the State stated more directly what it hints at here: that when a state criminalizes behavior, First Amendment protection is withdrawn. Yoder, involving a criminal statute, conclusively refutes this claim. Moreover, given the modern tendency to impose criminal sanctions on many dispproved forms of behavior -- from alcohol beverage law violations to zoning infractions -- such a rule would withdraw free exercise protection from countless types of religiously motivated conduct, no matter how nominal the criminal sanction.

[12] Thomas v. Review Board, 450 U.S. 707, 718 (1981).

[13] Bowen v. Roy, 476 U.S. 693, 728 (1986) (O'Connor, J.).

And, in Wisconsin v. Yoder, 406 U.S. 205, 215 (1972), then Chief Justice Burger summarized the Court's free exercise jurisprudence as follows:

> [t]he essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.

While the words may differ, the import is clear: government cannot rely on theoretical interests when its laws infringe on an individual's most basic right to religious liberty. "Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of

First Amendment freedoms . . ." Bowen v. Roy, 476 U.S. at 728 (O'Connor, J).[14]

Compelling interest analysis or "balancing" is a recognition that in a constitutional democracy it is sometimes necessary for even cherished liberties to yield to other paramount state interests. But it is not a search for a magical formula which, merely by being invoked, defeats a plaintiff's claim.[15] The interests asserted must be real, not imagined; they must reflect a considered determination that a particular statute or regulation demands uniformity. And there must be an evidentiary showing of a close relationship between the interest underlying the law and the means chosen to implement that interest.[16]

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[14] When First Amendment rights are implicated, this Court has long made it clear that it is not enough for government to show that its ultimate goal is important. Government also must show that it has chosen the least intrusive means of achieving that goal, however important. See, e.g., Schneider v. New Jersey, 308 U.S. 147 (1939); Cantwell v. Connecticut, 310 U.S. 296 (1940).

[15] See Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L.J. 943 (1987). Professor Aleinikoff argues that serious balancing would require intensive investigation of innumerable facts, a process that "courts are unwilling or unable to undertake." Aleinikoff, supra at 978. Nevertheless, if balancing is to have any meaning, the

Here, the State of Oregon has had some difficulty in locating exactly what interest it has in denying respondents' unemployment benefits. At the beginning, the State argued that its interest was in protecting the integrity of the unemployment compensation fund. *See* the State's Brief to the Oregon Court of Appeals in *Black* at 15, and in *Smith* at 11-12.

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government must be pressed to present the true interest it has in curtailing a constitutional right and must also be prepared to concretely defend why that interest will suffer if the right is protected.

[16] *Cf.* *Wygant v. Jackson Board of Education*, 476 U.S. 267, 280, n. 6 (1986). *See generally* Clark, *Guidelines For The Free Exercise Clause*, 83 Harv. L. Rev. 327 (1969).

No doubt because the "financial integrity" argument has been rejected by this Court several times, most recently in Hobbie, the State, in its later appeals, began instead to speak of the evils of peyote use and the dangers of appearing to sanction its use by accommodating the religious needs of Native American Church members.[17]

In its latest Brief, the State has once again changed the cast of its argument. Although it still makes fleeting reference to the "health and well being of individual drug users," (State Brief, at 23), capitalizing on the drug abuse problem that has beseiged our nation, it now focuses its attention on the allegedly disastrous effect an exemption would have on drug enforcement in this country. Allowing Native Americans to engage in religious peyotism, the State claims, would do no less than "weaken the entire fabric of the nation's controlled substances laws." (State Brief at 23).

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[17] This "interest" was not asserted at any proceeding at which evidence relating to the dangers of peyote or the implications of a religious exemption could be evaluated by a trier of fact. Since the State never raised this argument nor introduced any "evidence" on this issue prior to appeal, it is not properly part of the record. See, e.g., Witters v. Washington Department of Services for the Blind, 474 U.S. 481, 487 n.3 (1986). See also Brief Amicus Curiae of the American Jewish Congress in Support of Respondents, at pps. 35-39, submitted in Employment Division v. Smith, #86-946, #86-947.

Phrased so broadly, the State's interest in controlling the use of dangerous drugs necessarily appears more weighty than the narrow interest two adherents of a minority religion have in receiving unemployment benefits. For, as one commentator has noted, "to measure an individual interest directly against one of [government's] rarified values inevitably makes the individual interest appear the less significant." Clark, Guidelines For Free Exercise Clause, 83 Harv. L. Rev. 327, 331 (1969).

The State, however, also has an equally significant interest in preserving religious liberty, and, in particular, in assuring that minority religions do not suffer at the hands of an insensitive or intolerant majority. And "for a balancing test to make any sense, relatively equal levels of generality or abstraction must be chosen for each side of the balance." Pepper, Taking the Free Exercise Clause Seriously, 2 B.Y.U.L. Rev. 299, 310 (1986).[18]

This Court, embracing this reasoning, has not permitted a state to rest on vague or unsupported assertions of a general interest when confronting a free exercise claim for accommodation. Rather, even when government has shown that "an especially important" interest is at stake, it must still show that "unbending application of its regulation to the religious objector" is essential to prevent substantial harm to that interest.[19]

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[18] See also Pound, A Survey of Social Interests, 57 Harv. L. Rev. 1, 2 (1943) (balancing must compare interests on "the same plane"); Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L.J. 943, 973-976 (1987) (discussing the need to develop a common "scale of values").

Nor has the Court hesitated to apply this searching analysis when confronting a state interest of undeniable importance. In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court agreed that the State of Wisconsin had a strong interest in enforcing its compulsory education laws. "Providing public schools stands at the very apex of the function of a state." Id at 213. But it rejected the argument that this general interest was so compelling it was absolute:

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[19] Bowen v. Roy, 476 U.S. at 728, (O'Connor, J.). See also Clark, supra at 331 ("the importance of a law should be measured not by all the benefits it confers on society, but by the incremental benefit of applying it to those with religious scruples.")

> Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.

Id at 221.

In Yoder, the Court concluded that the State had not shown with sufficient "particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish." Id at 236. The State of Oregon fares no better. Despite a feverish attempt to paint a picture of a drug enforcement effort riddled with exemptions, it too has failed to demonstrate with precision or "particularity" how the nation's efforts at controlling drug abuse would be adversely affected by decriminalizing religious peyote use by members of the Native American Church.

B. The State Has Not Proven Accommodation Would Endanger Native American Church Members

Although the State, at this stage, appears most concerned about the consequences of a religious peyote exemption to its law enforcement efforts, it does contend, albeit briefly, that it must forbid Native Americans from using peyote at religious ceremonies in order to protect their "health and well being." (State Brief at 6). Peyote use, the State claims, is harmful regardless of its motivation.

As proof that even religious peyote use is unsafe, the State points out that most jurisdictions classify peyote as a highly dangerous substance. Of course, many of these jurisdictions also allow Native Americans to engage in religious peyote use, either through statutory or judicially mandated exemptions. See pps. 34-41 infra. Yet the State has failed to come forward with one concrete piece of evidence to show that these jurisdictions have experienced a rise in health and safety problems among their Native American populations.

Congress has determined that certain drugs have a "substantial and detrimental effect on the health and general welfare of the American people," 21 U.S.C. §801(2) (1988), and accordingly has imposed severe penalties on those possessing these drugs. 21 U.S.C. §841(a). Although peyote has been included within this class of prohibited drugs since 1965,[20] and is listed as a controlled substance on Schedule I of the Controlled Substance Act, 21 U.S.C. §812(c), the Attorney General has specifically exempted its religious use by Native American Church members:

> The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration. Any person who manufactures peyote for or distributes

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[20] Congress first proscribed peyote in the Drug Abuse Control Amendments of 1965. 79 Stat. 226 §3(a). The legislative history reveals that Congress understood that the bona fide religious use of peyote would not be forbidden by the Amendments. See, e.g., 111 Cong. Rec. 15977 (1965). See generally Native American Church of New York v. United States, 468 F. Supp. 1247 (S.D.N.Y. 1979), aff'd mem., 633 F.2d 205 (2d Cir. 1980). For a complete discussion of the history of the peyote exemption for Native American Church members, see Government's Brief in Olsen v. Drug Enforcement Administration, (D.C. Cir.) No. 86-1442, at 4-6, n.4 (cited in State's Brief at 9, n.2).

> peyote to the Native American Church, however, is required to obtain registration annually and to comply with all other requirements of law.

21 C.F.R. §1307.31 (1988).[21]

The State suggests that the federal government has now somehow disavowed this exemption (State Brief at 9-10 n.2).[22]

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[21] This exemption reflects recognition that the "Native American Church is sui generis" because it regards "peyote as a deity." Comments of Mr. Sonnenreich of the Bureau of Narcotics and Dangerous Drugs, Drug Abuse Control Amendments of 1970, Hearings before the Subcommittee on Public Health and Welfare of the Committee on Interstate and Foreign Commerce, House of Representatives, 91st Cong., 2d Sess. 117-118 (1970).

[22] There is nothing in the government's brief in Olsen v. Drug Enforcement Administation, (D.C. Cir.) No. 86-1442, that even remotely supports the State's claim that the Drug Enforcement Administration had no authority to exempt Native American Church religious peyote use, or that the federal government now disapproves of that exemption. Rather, the Justice Department has taken the position that the DEA has no authority to exempt the religious use of marijuana because, unlike peyote with its "unique history," (Gov't Brief in Olson at 15), Congress has not authorized that exemption. Moreover, in Olson, the government contended

This is simply not true. The exemption has been continued by regulation each and every year and is contained in other federal regulations as well. See, e.g., 25 C.F.R. 11.87(H) (1988) (religious peyote exemption from offenses committed in Navajo country); 52 Fed. Reg. 35674-01 (Sept. 22, 1987) and 52 Fed. Reg. 2452-01 (Jan. 22, 1987) (allowing Native Americans to cultivate and use peyote at religious ceremonies in National Park System).[23]

Moreover, in 1978, Congress enacted the American Indian Religious Freedom Act ("AIRFA"), 42 U.S.C. §1996, which

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that, whereas a religious peyote exemption has proven to be workable, marijuana use is so pervasive, no religious accommodation is feasible. See pps. 51-55 infra.

[23] See also Peyote Way Church of God, Inc. v. Meese, 698 F.Supp. 1342, 1346-1347 (N.D. Tex. 1988) ("the clear intent of Congress was to exempt the non-drug use of peyote by members of the Native American Church").

provides that:

> Henceforth, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects and the freedom to worship through ceremonials and traditional rights. (emphasis added).

One of Congress' concerns in passing AIRFA was to protect the religious use of peyote by American Indians. 1978 U.S. Code Cong. & Ad News 1262-1264.[24] Indeed, Congress, despite its view that peyote in general poses "a health threat," explicitly praised the government's "well thought out exceptions" for members of the Native American Church. Id. at 1263.[25]

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[24] Congress recognized that to the Indians certain substances, such as peyote, "have religious significance, because they are sacred, they have power, they heal, they are necessary to the exercise of the rites of the religion, they are necessary to the cultural integrity of the tribe, and, therefore, religious survival . . . ." 1978 U.S. Code Cong. & Ad News at 1263.

The federal government has had over twenty years experience exempting religious peyote use. Yet despite its undeniably strong interest in preventing the "hazards of personal drug use" (State Brief at 21), it has apparently found that interest to be unimpaired by a narrow exemption carved out to protect the religious freedom of a small minority.

The federal government is not alone in exempting Native American Church members from criminal laws prohibiting peyote use. Many states have enacted statutory exemptions.[26] Other states, faced with a free exercise defense to a criminal conviction for peyote use, have judicially crafted exemptions.[27]

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[25] Although AIRFA does not create independent legal rights, despite the State's contention to the contrary, it clearly reflects an "affirmative policy choice" to protect Native American religious peyote use. (State Brief at 10).

Native American Church members have long been free to use peyote in these jurisdictions, yet there is no evidence to suggest that individual peyotists have suffered any harmful consequences, or that the exemption has contributed in any way to the drug problem in Oregon or elsewhere. Indeed, Oregon has utterly failed to show why its drug problem is so uncontrollable that it must refuse an exemption to Native American Church members that has been freely granted by these many jurisdictions. See Boos v. Barry, 108 S.Ct. 1157, 1167-1168 (1988) (that other jurisdictions had less restrictive measures to protect foreign embassies undercuts claim that more restrictive measures are necessary).

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[26] *See, e.g.*, Ariz. Rev. Stat. Ann. §13-3402(B)(1-3) (1988); Colo. Rev. Stat. §12-22-317(3) (1985); Iowa Code Ann. §204.204(8) (1987); Kan. Stat. Ann. §65-4116(8) (1985); Minn. Stat. Ann. §152.02 (West 1989); N.J.A.C. 8:65-8.12 (Supp. 1986); Nev. Rev. Stat. Ann. §453.541 (1987); N. Mex. Stat. Ann. §30-31-6(d) (1988); S.D. Cod. Laws Ann. §34-20B-14 (17) (1986); Tex. Rev. Civ. Stat. Ann., art. 4476-15 §4-11(a) (Vernon Supp. 1989); Wis. Stat. Ann. §161.115 (1974); Wyo. Stat. Ann. §35-7-1044 (1988). *See also* Mont. Rev. Code Ann. §94-35-123 (1947), overturning *State v. Big Sheep*, 75 Mont. 219, 243 P. 1067 (1926). Significantly, according to the 1980 Census, these states, plus California and Oklahoma, which have judicial exemptions, account for almost 65% of the Native American Indian population. Table 62, General Population Characteristics, United States Census, 1980.

[27] *See, e.g.*, *People v. Woody*, 61 Cal. 2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964); *State v. Whittingham*, 19 Ariz. App. 27, 504 P.2d 950 (1973) (for all bona fide peyotist religions); *Whitehorn v. State*, 561 P.2d 539 (Okla. Crim. App. 1977). *But see* *State v. Bullard*, 207 N.C. 599, 148 S.E.2d 565 (1967) (question of religious sincerity).

Even the State of Oregon was prepared to exempt Native American religious peyotism until the State Attorney General intervened. The Oregon State Board of Pharmacy, which is the agency authorized to determine what drugs should be prohibited and what exemptions should be granted, Or. Rev. Stat. §475.035 (1985) -- and hence which pose a threat to the public health and safety and which do not -- in 1987 adopted a rule exempting the use of peyote in Native American Church ceremonies. It only rescinded that exemption when the Attorney General, in what appears to be a post-litigation attempt to shape the record to suit its perceived interests, opined that a rule protecting only Native American Church members was itself unconstitutional on Establishment or Equal Protection grounds. (See App. 6 to Brief in Opposition to Petition for Writ of Certiorari). Purported danger to Native Americans was simply not an issue.[28]

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[28] The State equates the religious use of peyote with the religious handling of snakes, drinking of poison, or self mutilation. (State Brief at 21 n. 21). Those practices are patently dangerous.

In fact, the record in this case, though sparse, refutes the contention that peyote, when used at Native American Church ceremonies, poses a danger to Church members. Professor Omer C. Stewart, an expert since 1938 on the use of peyote in religious ceremonies, testified at respondent Smith's hearing that "nothing has been shown to be as effective in combatting the negative effects of alcoholism as the use of peyote in an Indian religious ceremony." (Smith Tr., Exh. 7).[29]

In *State ex rel Swann v. Pack*, 527 S.W.2d 99, 113 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976), for example, snakes were handled in a "crowded church sanctuary, with virtually no safeguards, with children roaming about unattended." At least two people died at one ceremony. The ceremonial use of peyote by the Native American Church, a practice condoned by many states and by the federal government for over 20 years, has not been shown to be fraught with the same dangers.

[29] Professor Stewart has written extensively on this subject. *See generally* Stewart, *Washo-Northern Paiute*

Dr. Robert Bergman, a Clinical Associate Professor of Psychiatry and an expert on Indian health, similarly testified that the ceremonial use of peyote "is the single most effective manner of treatment for Indian alcoholism and drug abuse;" moreover, the hallucinogenic effects of peyote disappear by the time the ceremony is complete and "it is extremely rare for the use of peyote in a Native American Church ceremony to lead to . . . negative effects." (Smith Tr., Exh. 7).[30]

It is very easy for the State to assert that peyote use is dangerous

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Peyotism, 63 (Univ. of Cal. Press 1944), reprinted in Stewart & Aberle, *Peyotism in the West* (Univ. of Utah Press 1984).

[30] Dr. Bergman, who also has written extensively on ritual peyote use, has elsewhere commented on the lack of "negative reactions" to peyote use among Native American Church members. *See* Steiger, *Medicine Power - The American Indian's Revival of his Spiritual Heritage and Its Relevance for Modern Man* 196-197 (Doubleday, 1964). *See also*

regardless of motivation. But if the Free Exercise Clause is to have any meaning, unsupported speculation about theoretical harm must not be permitted to substitute for proof that a religious exemption will undermine a particular state interest.[31]

C. The State Has Not Proven Accommodation Would Significantly Impede Drug Enforcement

The State contends that if religious peyote use is protected by the First Amendment, all others who claim a religious right to use drugs must be granted the same right on "like terms." (State Brief at 18). This would have supposedly devastating consequences to our nation's

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Anderson, *Peyote: The Divine Cactus*, 165-166 (Univ. of Ariz. 1980) (quoting Dr. Bergman as saying he had "seen almost no acute or chronic emotional disturbance arising from peyote use.")

[31] *See*, *e.g.*, *Sherbert*, 374 U.S. at 407-408 (refusing to accept as compelling state's unsupported fear that accommodation would promote false religious claims); *Thomas*, 450 U.S. at 719 (same).

drug enforcement efforts.

It is true that some members of this Court have expressed concern that the granting of exemptions from laws of general applicability constitutes an unjustifiable departure from "government's interest in uniform treatment for the members of all religious faiths." Goldman v. Weinberger, 475 U.S. 503, 512 (1986) (Stevens, J., concurring); United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J. concurring). And uniform treatment of all religions is an important interest underlying the religion clauses. Bob Jones University v. United States, 461 U.S. 574, 605, n. 30 (1983); Larson v. Valente, 456 U.S. 228 (1982). But it is not the only one, for the interest in allowing minority faiths to flourish is at least equally weighty, and, in cases like this, where the very life of a minority religion is at issue, even weightier. To allow the abstract interest in equality to trump all other concerns in every case is to allow the very complexity and heterogeneity of society to serve as an excuse for running roughshod over minority religious practices.[32]

In any event, the State misconceives the nature of a religious accommodation mandated by the Free Exercise Clause. Granting a narrowly drawn exemption to a particular religion because of its unique circumstances does not necessarily require an exemption for all religions that do not share those circumstances.[33] Rather, when, as would be the case here, an entire religion is in effect outlawed by a governmental rule or policy, a court must carefully balance that harm against the precise harm to the state interest if a religious exemption is extended. The balance will not always tip the same way.

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[32] The State suggests that since any religious exemption from a "neutral law of general applicablity" creates Establishment Clause problems, all religious exemptions should be avoided. (State Brief at 18). This Court has repeatedly rejected this same argument and "has long recognized that the government may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause." Hobbie, 480 U.S. at 144-145. See also Yoder, 406 U.S. at 220-221; Thomas, 450 U.S. at 719-720; Sherbert, 374 U.S. at 409.

Thus, in Wisconsin v. Yoder, the Court emphasized that its decision was based on a "convincing showing" made by the Amish, "one that probably few other religious groups or sects could make." 406 U.S. at 235-236. This included evidence demonstrating that the state's interest would not be seriously impaired were an exemption granted whereas compulsory education "would gravely endanger if not destroy the free exercise of [the Amish] religious beliefs." Id. at 218-219.[34]

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[33] *See generally* *United States v. Lee*, 455 U.S. 252, 261 (1982); *Gillette v. United States*, 401 U.S. 437, 451-453 (1971).

A total prohibition on peyote use would "gravely endanger if not destroy" the Native American Church.[35] Peyote is more than a sacrament of the Church; it is the basis of the religion itself. If peyote use is banned, the religion dies.

Not all claiming a religious reason for using an illegal drug would suffer such grave harm. And while courts are not empowered to evaluate the "centrality" of a religious practice, Lyng, supra, 108 S.Ct. at 1329-1330, they can distinguish between those that claim that their religion is merely "aided" by the use of drugs, and those for whom the drug is sacred.[36] See, e.g., Leary v. United States, 383 F.2d 851, 860-861 (5th Cir. 1967), rev'd on other grounds, 395 U.S. 6 (1969) (an "aid to attain consciousness expansion"); People v. Collins, 273 Cal. App. 2d 486, 78 Cal. Rptr. 251 (1969) (same); State v.

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[34] As noted above, several courts, citing the unique situation of the Amish, have refused to extend a similar exemption to other churches. See p. 22, n. 10, supra. Courts have drawn distinctions among religions in other contexts as well. For example, just recently, in Benjamin v. Coughlin, 708 F.Supp. 570, 575 (S.D.N.Y. 1989), because of the "undue financial and administrative burdens" involved, a district court refused to allow Rastafarian prisoners an extremely complex special diet, although Orthodox Jewish and Muslim prisoners were accorded far simpler special diets.

[35] See Woody, 394 P.2d at 818; Whittingham; 504 P.2d at 952; Affidavits of Stanley Smart; Dr. Robert Bergman; and Reverend Emmerson Jackson, Exh. 7 to Smith transcript.

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[36] Indeed, in many of the cases cited by the State, the courts have not actually examined the sincerity of the religious belief, simply assuming sincerity in order to reach the "compelling interest" question. See, e.g., Hawaii v. Blake, 695 P.2d 336 (1985) (Hindu Tantrism); Whyte v. United States, 471 A.2d 1018 (D.C. App. 1984) (Rastafarian); Vermont v. Rocheleau, 142 Vt. 61, 451 A.2d 1144 (1982) (Tantric Buddhism). Sincerity, however, is obviously a prerequisite to any legitimate Free Exercise Claim.

Brashear, 92 N. Mex. 622, 593 P.2d 63 (1979) (marijuana a means of having access to "God's herbs").

Courts are also capable of perceiving distinctions between the manner in which different religions use illegal substances. The Native American Church carefully controls the use of peyote by its members. Peyote is used only at occasional, supervised religious ceremonies; any other use is considered sacreligious. Woody, 294 P.2d at 817; Whittingham, 504 P.2d at 950-951.[37] The potential for abuse is therefore very limited. See Peyote Way Church of God v. Smith, 742 F.2d 193 (5th Cir. 1984); Govt Brief in Olsen, supra, p. 35, n. 20.

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[37] See also Slotkin, The Peyote Way at 104, reprinted in Teaching From the American Faith - Indian Religion and Philosophy (Tedlock Ed. 1975) ("peyote is"sacrament" to church, which "refuses to permit the presence of curiousity seekers at its rites, and vigorously opposes the sale or use of Peyote for non-sacramental purposes").

In contrast, the use of other drugs by other religions is much less strictly regulated and more obviously harmful, thus making the need for an absolute prohibition more compelling. For example, members of the Ethopian Zion Coptic Church, who have vigorously pursued a Free Exercise claim to use marijuana, admit that their religious services involving marijuana:

> are not restricted to any specific time of day, to any time of the week, or to any specific place, but are performed three times a day (morning, afternoon, and evening). During religious services, marijuana is mixed with tobacco and smoked in pipes that are passed among the church members . . . . Coptics do not inhale the smoke; they "avoid" its "intoxicating effects" by taking it in their mouths and exhaling it from their noses. During the religious ceremonies marijuana is distributed to those present who wish to partake (members and nonmembers). It may be, and sometimes is, distributed to children.

Commonwealth v. Nissenbaum, 404 Mass. 575, 536 N.E.2d 592 (1989).[38]

There is also a vast difference in the public demand for peyote and for marijuana and in the likelihood that a religious exemption would prompt false claims. Peyote is unpleasant tasting:

> The eating of peyote usually is a difficult ordeal in that

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[38] See also Vermont v. Rocheleau, 142 Vt. 61, 451 A.2d 1144 (1982) (Tantric Buddhist arrested for marijuana use in nightclub restroom); Olsen v. State of Iowa, 808 F.2d 652 (8th Cir. 1986) (contrasting controlled, isolated peyote use by Native American Church with Coptic Church's "continuous and public use of marijuana"); State v. Olsen, 315 N.W.2d 1 (Iowa 1982) (marijuana used "continually all day, through church services, through everything we do"); People v. Torres, 133 Cal. App. 3d 265, 184 Cal. Rptr. 39 (1982) (marijuana used in "open and indiscriminate matter" without "prescribed safeguards"); Lewellyn v. State, 592 P.2d 538 (Okl. Cr. 1979) (sale of marijuana to non-member of religion); Town v. Florida, 377 So.2d 648 (Fla. 1979) (continuous use of marijuana by members and nonmembers of church, including young children); State v. Brashear, 92 N. Mex. 622, 693 P.2d 63 (1979) (defendant "would have no compunction . . . about selling marijuana to minors.").

> nausea and other unpleasant manifestations occur regularly . . . . The curious user frequently comments that it was an "interesting experience but not worth going through again."[39]

It is unlikely many people would fake religious belief in order to take advantage of a peyote use exemption. On the other hand, enforcement of drug laws might well be impracticable if religious exemptions were routinely granted to those professing a religious need to use a highly popular drug, such as marijuana.[40]

The federal government has itself recognized this critical difference between peyote and marijuana. According to the Drug Enforcement Administration, "the actual abuse and availability of marijuana in the United States is many times more pervasive in American society than that of peyote."[41] The statistics are striking -- 15,302,468.7 pounds of marijuana were seized and analyzed by the DEA between 1980-1987. In the same seven year period, a mere 19.4 pounds of peyote were similarly seized and

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[39] Anderson, Peyote: The Divine Cactus at 161 (Univ. of Ariz. Press 1980). See also Slotkin, The Peyote Way at 98 ("many find it bitter, inducing indigestion or nauseau. A common complaint is "It's hard to take Peyote").

[40] The 1985 National Household Survey on Drug Abuse conducted by the National Institute on Drug Abuse reports that 62 million Americans have tried marijuana at least once, and currently,

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among young people, 15 million use marijuana monthly, 9 million use it weekly, and 6 million, daily. In contrast, only 13 million Americans have ever tried *any* hallucinogen, which includes LSD, PCP, mescaline and peyote, and there are only 960,000 current users of *all* hallucinogens in *all* age groups.

[41] *See* DEA Order, *In the Matter of Petition of Carl E. Olsen For the Ethiopian Zion Coptic Church For An Exemption From the Controlled Substances Act* No. 86-1442 (July 26, 1988), attached as Appendix A to Government Brief in *Olsen*, cited at p. ___ *supra*.

analyzed.[42]

Finally, as the courts that have denied religious exemptions to other religious adherents have recognized, Native Americans occupy a "*sui generis* legal status." *United States v. Rush*, 738 F.2d 497, 513 (1st Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985). Sometimes this special status works against them. *See, e.g.*, *United States v. Antelope*, 403 U.S. 641 (1977) (Native Americans subject to federal criminal jurisdiction with more severe penalties than comparable state law). But sometimes, because of it, they are entitled to receive special benefits. *See*, *e.g.*, *Morton v. Mancari*, 417 U.S. 535 (1974) (employment preference for Native Americans does not violate Equal Protection Clause).[43] If this particular Native American religion is to survive, this should be one of the times when Native American status merits preferential treatment.

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[42] *See* DEA Order, n. 41 *supra*.

[43] In both *Antelope* and *Mancari*, this Court recognized that federal regulation of Indian affairs is "rooted

For far too many years, government actively sought to suppress Native American tribal religions. Fortunately, many of those religions endure. The State of Oregon, however, seeks to deny constitutional protection to Native American Church members -- to once again freely criminalize the most sacred practice of a Native American religion, and, perhaps, stamp out the religion itself. It is motivated not, at heart, because it fears that Native Americans who practice peyotism are harming themselves or others; rather, eliminating Native American peyotism would be a

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in the unique status of Indians as 'a separate people' with their own political institutions." Antelope, 430 U.S. at 646; Mancari, 417 U.S. at 552-554.

symbolic step in its war against drugs. (State Brief at 12-16).

But "this justification is unacceptable . . . the impairment of individual liberties cannot be the means of making a point . . . symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs" cannot justify the destruction of an entire Native American religion. National Treasury Employees Union v. Von Raab, 109 S.Ct. 1384, 1401 (1989) (Scalia, J., dissenting).

Conclusion

For the foregoing reasons, the decision of the Oregon Supreme Court should be affirmed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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No. 88-1213

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

◆

EMPLOYMENT DIVISION, OREGON DEPARTMENT OF HUMAN RESOURCES, *et al.*,

Petitioners,

—v.—

ALFRED L. SMITH, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE
SUPREME COURT OF THE STATE OF OREGON

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF OREGON IN SUPPORT OF RESPONDENTS

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48pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 18

ARGUMENT 21

I. THE PETITION FOR CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED SINCE THE ABSTRACT QUESTION ON WHICH CERTIORARI WAS GRANTED HAS BEEN DECLARED IMMATERIAL TO THE FACTS OF THIS CASE BY OREGON'S HIGHEST COURT 21

II. EVEN IF OREGON'S CRIMINAL LAW PROHIBITION WERE RELEVANT, AN UNENFORCED PROHIBITION AGAINST THE USE OF PEYOTE UNDERMINES THE COMPELLING STATE INTEREST REQUIRED TO ALLOW INTRUSION ON THE STRICTLY CONTROLLED RELIGIOUS USE OF PEYOTE PROTECTED BY THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT 30

CONCLUSION 42

TABLE OF AUTHORITIES

Page

CASES

Allegheny County v. ACLU,
57 U.S.L.W. 5045 (July 3, 1989) 38

Black v. ADAPT,
Case No. E-84-1520
(Or.Cir.Ct., Douglas Co.),
dismissed per stipulation,
March 31, 1986 17

Bowen v. Roy,
476 U.S. 693 (1986) 39, 40

Cantwell v. Connecticut,
310 U.S. 296 (1940) 38

Diamond Fruit Growers, Inc.
v. Employment Division,
553 P.2d 1080 (1976) 14

EEOC v. Douglas County Council,
Civ. No. C85-6139-E
(D.Or. March 5, 1986) 17

Frazee v. Illinois Dep't
of Employment Sec.,
489 U.S. ___,
109 S.Ct. 1514 (1989) . . . 21, 30, 31, 36

Glide Lumber Products Co.
v. Employment Div.,
741 P.2d 907 (1987) 23

Goldman v. Weinberger,
475 U.S. 503 (1986) 38

Page

Hobbie v. Unemployment Appeals
Comm'n of Florida,
480 U.S. 136 (1987) 30, 31

Lyng v. Northwest Indian
Cemetery Protective Ass'n,
485 U.S. ___,
108 S.Ct. 1319 (1988) 40

People v. Woody,
394 P.2d 813 (Cal.Sup.Ct. 1964) 28

Shapiro v. Lyle,
30 F.2d 971 (W.D.Wash. 1929) 35

Sherbert v. Verner,
374 U.S. 398 (1963) . . 20, 30, 32, 40, 41

Thomas v. Review Board,
450 U.S. 707 (1981) 30

United States v. Lee,
455 U.S. 252 (1982) 38

Wisconsin v. Yoder,
406 U.S. 205 (1972) 38, 39

STATUTES AND REGULATIONS

American Indian
Religious Freedom Act,
42 U.S.C. §1996 33

21 C.F.R. §1307.31 34

Or.Rev.Stat.
§475.992(4)(a) 24
§657.176(2)(a) 5, 7, 8, 14
§657.176(3) 14, 22

LEGISLATIVE HISTORY

H.R.Rep.No. 1308,
95th Cong., 2d Sess. 2 (1978) 34

OTHER AUTHORITIES

Albaugh and Anderson,
"Peyote in the Treatment of
Alcoholism Among American
Indians, 131 Am. J.
Psychiatry 1247 (1974) 28

Lupu, "Where Rights Begin:
The Problem of Burdens on the
Free Exercise of Religion,
102 Harv.L.Rev. 933 (1989) 35

Pascarosa and Futterman,
"Ethnopsychedelic Therapy
for Alcoholics: Observations
in the Peyote Ritual of the
Native American Church,"
8 (3) J. of Psychedelic
Drugs 215 (1976) 28

Slotkin, The Peyote Religion:
A Study in Indian-White
Relations (1975) 33

Smith v. ADAPT,
EEOC Charge No. 10184281,
Determination (July 18, 1984) 17

Stewart, Peyote Religion:
A History (1987) 32

Tribe, American Constitutional Law,
(2d ed. 1988) 25

INTEREST OF AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization dedicated to defending and preserving the principles embodied in the Bill of Rights. The ACLU of Oregon is one of its state affiliates.

Since its founding almost 70 years ago, the ACLU has appeared before this Court in numerous cases involving questions of religious freedom, both as direct counsel and as amicus curiae. Of particular note here, the ACLU appeared as amicus curiae when these cases were previously before the Court. Employment Division v. Smith, 485 U.S. ___, 108 S.Ct. 1444 (1988) (Smith I). In addition, the ACLU of Oregon has filed amicus curiae briefs on the two occasions when these cases were considered by the Oregon Supreme Court.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk pursuant to Rule 36.2.

STATEMENT OF THE CASE

1. Galen W. Black and Alfred L. Smith are members of the Native American Church. Each was employed as a rehabilitation counselor by the Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment (ADAPT), a private nonprofit organization. Black Tr.6-7.[2/]

Black, a former alcohol and drug abuser, was hired by ADAPT on September 12, 1982. At the time, he was not a member of the Native American Church. Black joined the church, and began attending church ceremonies, in March 1983. Black Tr.29-30. On September 10, 1983, Black attended a weekend Teepee ceremony at which he ingested a nominal amount of peyote as a sacrament -- a quantity insufficient to produce any hallucinogenic effect. Black Tr.34-35. That is the only occasion on which Black is alleged to have used any drug while employed by ADAPT. Black Tr.13.

Smith, a former alcohol abuser, was hired by ADAPT on August 25, 1982. At the time, Smith was a member of the Native American Church. On March 4, 1984, Smith attended a weekend Teepee ceremony at which he ingested a nominal amount of peyote as a sacrament -- again, a quantity insufficient to produce any hallucinogenic effect. Smith Tr.41-42. This was the only occasion on which he is alleged to have used any

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[2/] "Tr." refers to the transcript of the hearing before the referee. "Ex." refers to exhibits received in evidence by the referee. "Index Item" refers to the record on review in the Oregon courts.

drug while employed by ADAPT. Smith Tr.14, 43; Smith Ex.6.

There is no suggestion that Black or Smith went to work for ADAPT intending or expecting to use peyote thereafter. Black did not even belong to the Native American Church when he was hired by ADAPT. He felt no religious impulse to participate in the peyote sacrament until he had been a member of the church for six months. Smith determined to use peyote at a church ceremony only after ADAPT had discharged Black. He did so apparently as an expression of religious solidarity. Smith Tr.37-38, 51-52; Smith Ex.4.

2. Black was suspended by ADAPT on September 19, 1983 for using peyote at the Teepee ceremony. On October 3, 1983, he was discharged after refusing to resign or undergo treatment for "misconduct connected

with work" within the terms of Or.Rev.Stat. §657.176(2)(a). He was discharged not because he had violated any law, but because he had violated ADAPT's unwritten "policy" forbidding any use of alcohol or nonprescription drugs by staff members who were former substance abusers. As ADAPT's Executive Director testified, "we would have taken the same action had [Black] consumed wine at a Catholic ceremony . . . ." Black Tr.27.

At the time, ADAPT's written personnel policy proscribed only "misuse" or "abuse" of alcohol or drugs by staff members who were former substance abusers.[3] Following Black's discharge, ADAPT amended its written personnel policy to provide that any use of alcohol or nonprescription drugs by staff members who were former substance abusers would be grounds for discharge. Smith Tr.10; Smith Ex.2. According to ADAPT's Executive Director, this had been ADAPT's policy all along, conveyed verbally to all new employees. Smith Tr.30. However, ADAPT's Executive Director also acknowledged that the written personnel policy was amended after Black's discharge because its language in this regard lent itself to "misinterpretation." Smith Tr.35.

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[3] See Black Ex.2, ADAPT Personnel Policy, Part V(A)(3) and (9), Part IV, Part X(B)(f), reprinted in the Joint Appendix for Smith I.

Nonetheless, Smith used peyote at the Teepee ceremony on March 4, 1984. He did so apparently as an expression of religious solidarity in the wake of Black's discharge and the Employment Division's subsequent denial of unemployment benefits to Black on February 3, 1984. See p.4, supra. Smith,

too, was discharged for "misconduct connected with work" under the provisions of §657.176(2)(a) -- that is, for violating ADAPT's policy forbidding any use of alcohol or nonprescription drugs by staff members who were former substance abusers. He was not discharged because ADAPT considered his conduct illegal. As ADAPT's Executive Director acknowledged, "that was not the basis for the action." Smith Tr.35.

3. Following their discharge, Black and Smith each applied for unemployment compensation benefits.

(a) On November 4, 1983, the Assistant Director for Employment of the Employment Division found that Black had been discharged for "violat[ing] a known company policy," and that this conduct disqualified Black from receiving unemployment benefits under §657.176(2)(a). Black Index Item 1, p.1.

Black then sought a hearing before a referee. The referee ruled on December 8, 1983 that Black had exercised "poor judgment" in using peyote but was not guilty of "misconduct," and therefore could not be denied benefits under §657.176(2)(a). Black Index Item 4, p.5. On February 3, 1984, the Employment Appeals Board -- ignoring Black's free exercise claim -- reversed the referee's ruling. It held that Black's behavior constituted "misconduct" disqualifying him from unemployment benefits. Black Pet.App.23.[4]

On October 16, 1985, the Oregon Court of Appeals, in an en banc decision, reversed the Appeals Board on the ground that

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[4] This citation refers to the 1986 petition for certiorari filed by Oregon in the Black case.

the Board had not given sufficient consideration to Black's free exercise claim. 707 P.2d 1274, 1277 (1985). If Black's ingestion of peyote was religiously motivated, the court ruled, denial of unemployment benefits would be improper. Id. at 1279-80. The court noted but did not comment on ADAPT's contention that all ADAPT employees "understood" ADAPT's policy to forbid all alcohol and nonprescription drug use by former substance abusers, even as a sacrament. Id. at 1276.

The court of appeals rejected the Employment Division's contention that a separate Oregon statute making possession of peyote a crime justified denial of unemployment benefits:

> Here, claimant was terminated for a violation of an employer rule prohibiting the use of drugs or alcohol by former abusers of those substances. The fact that there is an independent set of criminal laws which made his

> conduct coincidentally illegal is irrelevant, because he was not terminated for breaking the law. The question is not whether the state's action can be justified by the compelling interest of protecting the health and interest [sic] of the public. That justification is not advanced, nor could it be, because the relevant state action is not a criminal charge . . . but the denial of unemployment benefits. As noted above, the question is whether the state has a compelling interest in denying claimant's benefits because he violated a personnel rule.

Id. at 1280 (footnote omitted).

Therefore, putting the state's general interest in law enforcement aside as a matter of state law, the court of appeals held that the remaining state interest asserted by the Employment Division -- preventing dilution of the state's unemployment fund by employees who are "undeserving due to their own conduct" (id. at 1278) -- could not override Black's free exercise rights. The court remanded for further findings. Id.

On June 24, 1986, the Oregon Supreme Court unanimously affirmed, relying on its decision in Smith the same day. See pp.13-15, infra. The court held, however, that remand was unnecessary because "there is no genuine dispute that the ingestion of peyote is a sacrament of the Native American Church, that [Black] was a member of that Church and that his religious beliefs were sincerely held." 721 P.2d 451, 454 (1986).

(b) On March 22, 1984, the Assistant Director found that Smith had been discharged for "deliberately violating a known company policy," and that this behavior constituted disqualifying "misconduct connected with work" within the terms of §657.176(2)(a). He barred Smith from receiving benefits. Smith Index Item 1, p.1.

Smith then sought a hearing before a referee. In a decision issued on July 23, 1984, the referee agreed that Smith's conduct constituted "misconduct" within the meaning of the statute. But the referee ruled that Smith could not be denied unemployment benefits under the First Amendment because the conduct that led to his discharge was religiously motivated. Smith Pet.App.23-25.[5]

On August 28, 1984, the Employment Appeals Board reversed. It agreed that Smith's conduct constituted "misconduct" under the statute but held that the state's interest in enforcing "the proscription of illegal drugs" and in protecting its unemployment fund outweighed Smith's right to use peyote for religious purposes. Smith

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[5] This citation refers to the 1986 petition for certiorari filed by Oregon in the Smith case.

Pet.App.20.[6] On October 16, 1985, the court of appeals summarily reversed, relying on its opinion in Black. 709 P.2d 246 (1985)(per curiam). See pp.9-10, supra.

On June 24, 1986, the Oregon Supreme Court affirmed the court of appeals. It held that "[t]he denial of unemployment benefits significantly burdened Smith's free exercise rights." 721 P.2d 445, 450 (1986). Canvassing the relevant state statutory schemes, the Oregon court further held that any state interest justifying that burden "must be found in the unemployment compensation statutes, not in the criminal statutes proscribing the use of peyote." Id.

The Oregon court noted that, in certain specified circumstances, the state unemployment statute does disqualify from unemployment benefits employees who have been discharged for criminal conduct related to their employment. 721 P.2d at 450 n.3, quoting Or.Rev.Stat. §657.176(3). But the court found that "[t]his statute does not apply to [Smith]." Id.[7] The

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[6] See n.5, supra.

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[7] The Employment Division conceded in the Oregon Supreme Court that under Oregon law, unlike other states, "the commission of an illegal act or conviction of a crime is not, in and of itself, grounds for disqualification from unemployment benefits." Memorandum at 17. Moreover, the Employment Division recognized that Black and Smith could not have been denied benefits under §657.176 (3) because, among other things, neither had admitted to nor been convicted of the commission of a work-connected felony. Id.

The Employment Division acknowledged that the Employment Appeals Board has no authority to determine whether a discharged employee has committed a crime. Id. at 18, citing Diamond Fruit Growers, Inc. v. Employment Division, 553 P.2d 1080, 1082 n.2 (1976). The Employment Division stressed to the Oregon Supreme Court in its petition for reconsideration in Smith that respondent's conduct "is misconduct within the meaning of [Section] 657.176 (2)(a) not because it was criminal, but because it violated a standard of behavior which the employer had a right to expect of an employee." Petition at 1 n.1.

Oregon Supreme Court rejected the Employment Division's contention that the state's interest in preserving its unemployment fund from dilution justified the burden on Smith's free exercise rights. Id. at 450-51.

4. In Smith I, this Court vacated the judgment of the Oregon Supreme Court and remanded for further proceedings to determine whether the religious use of peyote violates Oregon criminal law and, if so, whether the law as applied is constitutional. Although acknowledging that the Oregon Supreme Court had declared Oregon's criminal laws immaterial to the question of whether respondents Smith and Black are entitled to unemployment benefits, the majority concluded that the basis for this determination was insufficiently clear from

the Oregon Supreme Court's opinion. 108 S.Ct. at 1448.

5. On remand, the Oregon Supreme Court reaffirmed its earlier statement that it is "immaterial to Oregon's unemployment compensation law whether the use of peyote violated some other law." 763 P.2d 146, 147 (1988). And in response to this Court's specific inquiry, the Oregon court held that the state drug laws did not provide a specific exemption for the religious use of peyote, but that such an exemption was constitutionally compelled by the Free Exercise Clause.

6. On July 18, 1984, while these other proceedings were pending, the EEOC -- acting on Smith's complaint -- found "reasonable cause" to believe that ADAPT had violated Title VII of the Civil Rights Act of 1964 in discharging Smith for his

sacramental use of peyote. Smith v. ADAPT, EEOC Charge No. 10184281, Determination, p.2 (July 18, 1984). After the EEOC filed suit against ADAPT in federal district court, ADAPT agreed (without admitting any Title VII violation) "to eliminate any discipline against members of the Native American Church for the non-drug sacramental use of peyote during a bona fide ceremony of the Native American Church." Consent Decree, pp.2-3 ¶B(2), EEOC v. Douglas County Council, Civ. No. C85-6139-E (D.Or. March 5, 1986).[8] ADAPT later settled with Black on similar terms, Black v. ADAPT, Case No. E-84-1520 (Or.Cir.Ct., Douglas Co.), dismissed per stipulation, March 31,

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[8] The consent decree is reprinted as Appendix A to Respondents' Brief in Opposition to Certiorari. As part of the consent decree, respondents Smith and Black also received an award of back pay. Id. at A3.

1986. Neither Black nor Smith has returned to ADAPT.

SUMMARY OF ARGUMENT

The remand decision by the Oregon Supreme Court explicity holds, for a second time, that the denial of unemployment benefits at issue in this case is unrelated to whatever law enforcement interest the state may have in prosecuting the sacramental use of peyote in religious ceremonies. That determination by Oregon's highest court rests on a construction of state law that is binding on this Court, and thus *certiorari* should be dismissed as improvidently granted. Alternatively, the validity of Smith's and Black's free exercise claim should be weighed against the *only* state interest found relevant by the Oregon Supreme Court -- namely, the state's

interest in maintaining the fiscal integrity of its unemployment compensation fund. To do otherwise would require this Court to render what would in effect be an advisory opinion.

This case therefore involves an important threshold issue: Who determines what state interests are appropriately balanced against the free exercise claim presented by these facts? *Amici* respectfully submit that the answer is clear under established constitutional doctrine. Indeed, *amici* are unaware of any decision in which this Court has ever upheld a burden on the exercise of fundamental rights based on a state interest that the state's highest court has declared immaterial. Any such result would turn somersaults with traditional notions of federalism.

In short, the question raised by the state in its petition for certiorari is not properly presented by this record. If the Attorney General of Oregon wishes to test the constitutionality of the state's imposition of criminal law sanctions against the bona fide sacramental use of peyote by sincere individuals in religious ceremonies of the Native American Church, he undoubtedly has the power to do so. This case, however, does not present that challenge.

Furthermore, even if Oregon's criminal law interest were relevant in the abstract, an entirely unenforced prohibition hardly constitutes the sort of compelling interest required to allow state intrusion into the bona fide sacramental use of peyote protected by the Free Exercise Clause of the First Amendment under Sherbert v. Verner, 374 U.S. 398 (1963), and its progeny.

Thus, in Frazee v. Illinois Dep't of Employment Sec., 489 U.S. ___, 109 S.Ct. 1514 (1989), this Court unanimously rejected the proposition that the mere assertion of hypothetical state harms is sufficient to defeat a free exercise claim. The same principle applies with even greater force here.

ARGUMENT

I. THE PETITION FOR CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED SINCE THE ABSTRACT QUESTION ON WHICH CERTIORARI WAS GRANTED HAS BEEN DECLARED IMMATERIAL TO THE FACTS OF THIS CASE BY OREGON'S HIGHEST COURT

Petitioners assert that the "issue for resolution in this case is whether the Free Exercise Clause protects peyote ingestion by Native American Church members from the reach of a state's criminal law prohibition." (Pet.Br. at 5). The record presents a very different case.

Smith's and Black's entitlement to unemployment compensation benefits is governed in the first instance by Oregon law. Three significant aspects of that law are beyond dispute. First, Oregon law provides that unemployment benefits may be denied to any applicant who has admitted, or been convicted of, a work-related felony. Or.Rev.Stat. §657.176(3). Second, this case does not involve any claim that Smith and Black were disqualified under this provision. Third, nothing in Oregon's statutory scheme otherwise mentions unlawful behavior (whether proved or alleged) even as an element in determining eligibility for employment benefits. In fact, the reported decisions reflect the Oregon law that unemployment benefits are often

awarded despite very serious allegations of unlawful behavior.[9]

The Oregon Supreme Court is not only familiar with this statutory scheme, but charged with interpreting it. Consistent with that obligation the Oregon Supreme Court held, in its initial consideration of this case, that "[t]he state's interest in denying unemployment benefits to a claimant discharged for religiously motivated misconduct must be found in the unemployment compensation statutes, not in the criminal statutes proscribing the use of peyote." 721 P.2d at 450. When this Court sought clarification, the Oregon Supreme Court reiterated its view "that it was immaterial to Oregon's unemployment compensation law whether the use of peyote violated some other law." 763 P.2d at 147.[10/]

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[9] See e.g., Glide Lumber Products Co. v. Employment Div., 741 P.2d 907 (1987)(admitted drug use while off-duty does not disqualify claimant from unemployment benefits); Hoard v. Employment Div., 696 P.2d 1168 (1985), 717 P.2d 664 (1986)(driver who ran red light while driving employer's vehicle, caused serious accident, was cited for traffic violation, but could not be denied unemployment benefits for willful disregard of employer's interest); Giese v. Employment Div., 557 P.2d 1354 (1976), reh'g denied, 277 Or. 491 (1977)(professor's felony conviction for conspiring to explode devices to destroy or damage federal buildings held not misconduct that was work-related so as to disqualify him form receiving unemployment compensation).

Only a remarkably skewed and extraordinarily ironic version of federalism might suggest that a federal court should reach out to determine the abstract, symbolic weight of a state's criminal law when that state's Supreme Court has clearly

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[10/] The Oregon Supreme Court also made the irrefutable point on remand that Oregon's unemployment procedure is hardly designed to determine guilt or innocence of an uncharged, untried crime, 763 P.2d at 148 n.3, and declined to issue an "advisory opinion" as to "the circumstances under which prosecuting members of the Native American Church under ORS 475.992(4)(a) for sacramental use of peyote would violate the Oregon Constitution." Id.

determined that the state criminal law is immaterial to the case at hand. Moreover, a classic ingredient of heightened scrutiny is the requirement that the state clearly articulate the interests on which it seeks to rely. See Tribe, American Constitutional Law, 1604-06 (2d ed. 1988). One indication of the strength of that principle is that amici are unaware of any case in which this Court has ever upheld a burden on the exercise of fundamental rights based on a state interest that the state's highest court has declared immaterial.

Amici recognize, of course, that the Oregon Attorney General has a different sense of Oregon's interests in the present case. Only the Oregon Supreme Court, however, can authoritatively construe Oregon law. The contrary claims of the Attorney General are really nothing more than policy arguments that should be presented to the Oregon legislature and not to this Court.

Yet, the Oregon Attorney General has chosen this case as a vehicle to argue for "a coordinated effort across the nation to provide a uniform, comprehensive network of regulations to further the goal of a drug-free society." (Pet.Br. at 5). Speculating about what might be desirable to some in an ideal world hardly addresses the reality of this case, in which the Oregon criminal law has never been invoked.[11] If it is important to decide whether the federal constitution creates an exemption for bona fide peyote use from the reach of state criminal laws, this Court can find

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[11] In any event, the exemption of religious peyote use from criminal prohibition under federal law and the law of 23 states, *Smith v. Employment Division*, 763 P.2d at 148 n.2, demonstrates the attenuated connection between this case and petitioners' asserted goal.

such a case. The instant case not only fails to present such an issue cleanly, it fails to present it at all.[12]

The abstraction of the question upon which *certiorari* was granted invites this Court to engage in a theoretical assessment of the relative weight to be afforded "non-drug sacramental use" of peyote, and to do so without the benefit of any context to measure whether and to what extent Oregon's speculative interest in criminal law enforcement might be at stake. This Court is hardly the appropriate forum for an abstract inquiry on a subject that has hitherto been left to legislators and experts.[13]

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[12] In his effort to keep this case alive, the Oregon Attorney General has battled the Oregon Board of Pharmacy as well as the Oregon Supreme Court. At its September 25, 1987 meeting, the Board adopted a permanent rule that "exempted Native American Church members using peyote from registration requirements and announced that the listing of peyote as a controlled substance in Schedule I does not apply to the *nondrug use of peyote in bona fide Native American religious ceremonies*." (Emphasis added). *See* Op.Cert. at A6-7. The Attorney General subsequently advised the Board that this rule was "probably . . . unconstitutional," and the Board withdrew the exemption it had adopted. *Id*.

Finally, it is worth noting that there is very little chance that the dispute that triggered this case will again recur. As previously noted, ADAPT signed a consent decree with the EEOC subsequent to the filing of this case in which ADAPT agreed "to eliminate any discipline against members of the Native American Church for the non-drug sacramental use of peyote during a bona fide ceremony of the Native American Church." See pp.16-17, supra. Given the terms of the consent decree, ADAPT can no longer discharge staff members who belong to the Native American Church, like Smith and Black, for using peyote as a sacrament at religious ceremonies.

For all of these reasons, amici respectfully submit that the petition for certiorari should be dismissed as improvidently granted. Alternatively, the validity of the free exercise claim presented here should be weighed against the only state interest found relevant by the Oregon Supreme Court -- namely, the state's interest in maintaining the fiscal integrity of its unemployment compensation fund.

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[13] There is evidence that sacramental use of peyote in ceremonies, such as those of the Native American Church, is an unusually effective means of combatting the devastating effects of alcoholism. See e.g., Albaugh and Anderson, "Peyote in the Treatment of Alcoholism Among American Indians, 131 Am. J. Psychiatry 1247 (1974); Pascarosa and Futterman, "Ethnopsychedelic Therapy for Alcoholics: Observations in the Peyote Ritual of the Native American Church," 8 (3) J. of Psychedelic Drugs 215 (1976). Moreover, as the Oregon Supreme Court observed, "[t]he experience of states that exempted bona fide religious use of peyote from the prohibition [of their criminal laws] did not support any compelling state interest in suppressing it." Smith v. Employment Division, 763 P.2d at 148, discussing People v. Woody, 394 P.2d 813 (Cal.Sup.Ct. 1964).

II. EVEN IF OREGON'S CRIMINAL LAW PROHIBITION WERE RELEVANT, AN UNENFORCED PROHIBITION AGAINST THE USE OF PEYOTE UNDERMINES THE COMPELLING STATE INTEREST REQUIRED TO ALLOW INTRUSION ON THE STRICTLY CONTROLLED RELIGIOUS USE OF PEYOTE PROTECTED BY THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT

For more than twenty-five years, this Court has adhered to the view that, absent compelling justification, a state cannot deny unemployment compensation benefits to individuals forced to leave their jobs because of their sincere religious precepts. In Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Board, 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136 (1987); and again in Frazee v. Illinois Dep't of Employment Sec., 109 S.Ct. 1514 (1989), this Court has made clear that indirect

burdens are no less coercive than direct burdens for an individual forced to choose between his or her religion and work. Such forms of coercion are therefore no less subject to the dictates of the Free Exercise Clause.

As this Court most recently reiterated in Frazee, when an individual is "forced to choose between fidelity to religious belief and . . . employment . . . the forfeiture of unemployment benefits for choosing the former over the latter brings unlawful coercion to bear on the employee's choice." Id. at 1516-17, quoting Hobbie, 480 U.S. at 144. Such coercion "'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control,'" Wooley v. Maynard, 430 U.S. 705, 715 (1977), quoting West Virginia Board of

Education v. Barnette, 319 U.S. 624, 642 (1943).

Many Americans may be less familiar with the Native American Church than with the various Christian beliefs involved in the quartet of prior free exercise-unemployment compensation cases beginning with Sherbert. This unfamiliarity surely offers no basis for distinguishing this case or for doubting the sincerity of its individual practitioners. In fact, as the sources assembled in the 1986 Brief Amici Curiae, Native American Church of North America and Native American Church of Navajoland, Inc., make abundantly clear, religious use of peyote has ancient roots, a distinguished tradition, and unquestioned centrality as a sacrament in a bona fide religion. See generally Omer C. Stewart, Peyote Religion: A History (1987);

J.S. Slotkin, The Peyote Religion: A Study in Indian-White Relations (1975).

Moreover, Congress explicitly recognized this tradition in 1978 when it adopted the American Indian Religious Freedom Act, 42 U.S.C. §1996, which declares:

> Henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

The accompanying House report is even more explicit: "Although acts of Congress prohibit the use of peyote as a hallucinogen, it is established federal law that peyote is constitutionally protected when used by a bona fide religion as a sacrament."

H.R.Rep.No. 1308, 95th Cong., 2d Sess. 2 (1978). *See also* 21 C.F.R. §1307.31.

Petitioners nonetheless suggest that a profound equal protection problem lurks within any recognition of11929 the well-established protections of the Free Exercise Clause. The core of petitioners' argument to this Court is a theoretical fear: "To require government to accommodate all religious drug use on the same terms would force government, on a religion-by-religion, drug-by-drug and individual-by-individual basis, to create exemptions from neutral regulations which otherwise apply uniformly to all citizens." (Pet.Br. at 6). But this fear may be raised against any free exercise claim.[14]

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[14] As Professor Lupu recently put it, "[b]ehind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of (continued...)

One wonders where in this parade of horribles petitioners might place the Prohibition-era exemption from federal and state prohibitions of the use of alcohol for sacramental purposes in Catholic and Jewish religious observances. *See Shapiro v. Lyle*, 30 F.2d 971 (W.D.Wash. 1929). If such exemptions are consistent with the Constitution, the precisely analogous exemption for sacramental peyote must be similarly constitutional.[15]

Petitioners' reliance on extreme hypotheticals overlooks the irrelevance of sloganeering to the resolution of specific

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[14] (...continued)
exemption demands from religious deviants of every stripe." Lupu, "Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion, 102 Harv. L.Rev. 933, 947 (1989)(footnote omitted).

[15] Such sacramental use of wine, incidentally, is conduct for which the employer allegedly also would have fired Smith and Black in this case. *See* p.5, *supra*.

Free Exercise Clause cases before the Court. This Court underscored the point last Term in Frazee, when it unanimously rejected the hypothetical fear of extremely unrealistic consequences as the sort of state interest "sufficiently compelling to override a legitimate claim to the free exercise of religion." 109 S.Ct. at 1518.

This Court's precedents make clear, of course, that an asserted religious belief might be "so bizarre, so clearly non-religious in motivation, as not to be entitled to protection under the Free Exercise Clause." Id. at 1518 n.2, quoting Thomas v. Review Board, 450 U.S. at 715. But there is simply no evidence of either limiting factor here. As the Oregon Supreme Court emphasized, numerous state legislatures and state courts, as well as Congress, have repeatedly recognized the

sincerity of the Native American Church's sacramental use of peyote in religious ceremonies and opted to protect such religious practice. The Oregon Attorney General does not claim that the religious beliefs in this case are either bizarre or insincere.

The only conceivable question that remains, therefore, is whether a criminal prohibition, on the books but unenforced, can generate a state interest that is sufficiently compelling to override a clear-cut free exercise claim. To pose the question is to supply the answer. If the state interest were sufficiently important, the state presumably would try to enforce the law and not rely on tertiary devices, such as denial of unemployment compensation, to carry out its vital interest. The absence of even a hint of criminal law enforcement in this case or, for that matter, in any other involving religious use of peyote in Oregon, underscores the minimal state interest at stake. A policy of continued desuetude fatally undercuts a claim of state interest "essential to accomplish an overriding governmental interest." United States v. Lee, 455 U.S. 252, 257-58 (1982).[16]

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[16] The existence of a criminal statute, even when enforced, has never been viewed as an automatic override of free exercise rights. E.g., Wisconsin v. Yoder, 406 U.S. 205 (1972); Cantwell v. Connecticut, 310 U.S. 296 (1940). The majority opinion in Smith I seemingly overlooks this fact by suggesting that the existence of a valid criminal statute is per se evidence of the illegitimacy of any free exercise claim. 108 S.Ct. at 1451. The mere fact that a constitutional claim is overridden in one context, however, does not mean that it ceases to exist in all contexts. This is especially true in religion cases under the First Amendment, where an appreciation of context has been deemed essential to nuanced decisionmaking. See Allegheny County v. ACLU, 57 U.S.L.W. 5045, 5051 (July 3, 1989); Goldman v. Weinberger, 475 U.S. 503 (1986).

There have been different formulations of the essential point, but the crux of the free exercise test is clear: government cannot rely on imaginary or abstract interests when its laws impinge upon basic religious freedoms. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)("only those interests of the highest order and those not otherwise served can over-balance legitimate claims to the free exercise of religion"); Thomas v. Review Board, 450 U.S. at 718 ("the least restrictive means of achieving some compelling state interest"); Bowen v. Roy, 476 U.S. 693, 728 (1986)("only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms . . . .")(O'Connor, J., concurring in part and dissenting in part). Invocation of an entirely symbolic, entirely unenforced state criminal law prohibition simply does not constitute an interest of the highest order. It surely does not represent a narrowly tailored approach that is as sensitive as possible to free exercise protections.

This Court repeatedly has made clear that the Free Exercise Clause is deeply concerned with forms of governmental compulsion that "coerce individuals into acting contrary to their religious beliefs." Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. ___, 108 S.Ct. 1319, 1326 (1988); Bowen v. Roy, 476 U.S. at 699-700; Sherbert v. Verner, 374 U.S. at 403-04; West Virginia State Board of Education v. Barnette , 319 U.S. at 638-642. For example, as Sherbert emphasized, it did not matter as a constitutional factor "that no criminal sanctions directly compel appellant to work a six-day week." 374 U.S. at 403. Surely it would be perverse if the outcome in Sherbert, or in any of the cases in the Sherbert line, were to be different if the relevant government were simply to refer to, but not actually to use, the strong medicine of criminal law rather than the milder forms of imposition upon individual religious choice that this Court has struck down as invalid.

CONCLUSION

For the reasons stated herein, the decision below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
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①

No. 88-1213

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN
RESOURCES, of the STATE OF OREGON,
W.E. HUNTER, Administrator,
Petitioners,

v.

ALFRED L. SMITH, GALEN W. BLACK and ADAPT,
Respondents.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of The State Of Oregon**

BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

Table of Authorities.......... ii

Statement of Interest 1

Summary of Argument.......... 2

Argument 3

I. The Public Interest in Controlling the Use and Availability of Dangerous Drugs is Admittedly Compelling; However, this Fact in and of Itself Should Not Determine the Outcome of This Case. 3

II. Government May Accommodate the Religious Use of Regulated Dangerous Drugs by the Proper Application of the Compelling State Interest/Least Restrictive Alternative Test. 10

III. Contrary to the State's Assertion, There is no Violation of the Establishment Clause in Applying Free Exercise Principles on a Case-by-Case Basis. 19

Conclusion 20

TABLE OF AUTHORITIES

Cases: Page
Abington School Dist. v. *Schempp*, 374 U.S. 203 (1963) . . 20
Bowen v. *Roy*, 106 S. Ct. 2147 (1986) 8, 9
Frazee v. *Illinois Dept. of Employment Security, 109 S. Ct. 1514 (1989)* 3, 4, 14
Hobbie v. *Unemployment Appeals Commission of Florida, 107 S. Ct. 1046 (1987)* 3, 4, 7, 8, 9, 14
Lynch v. *Donnelly*, 465 U.S. 668 (1984) 19
Olsen v. *Drug Enforcement Administration*, No. 86-1442 (D.C. Cir. Feb. 7, 1989) (1989 WL 65283) 11
People v. *Woody*, 61 Cal.2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964) 11, 12, 13, 14, 15, 17
Peyote Way Church of God, Inc. v. *Smith*, 742 F.2d 193 (5th Cir. 1984) 15
Sherbert v. *Verner*, 374 U.S. 398 (1963) 3, 4, 6, 7, 19
State University of New York v. *Fox*, ___ U.S. ___, 57 U.S.L.W. 5015 (U. S. 1989) 8
Thomas v. *Review Board*, 450 U.S. 707 (1981). 3, 4, 7, 13, 14
United States v. *Ballard*, 322 U.S. 78 (1944) 13
Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 4, 5, 6, 7, 8, 19

CONSTITUTIONAL AUTHORITIES:
United States Constitution
Amendment One . . . . *passim*

STATUTORY AUTHORITIES:
Volstead Act, 41 Stat. 308 (1919), 27 U.S.C.A. § 12 (1927) 2, 18
Use of Peyote in Bona Fide Religious Ceremonies 21 C.F.R. §§ 1307.31 (1984) 15

OTHER AUTHORITIES:
T. Hillerman, *People of Darkness* (1980) 12
L. Tribe, *American Constitutional* Law (2d ed. 1988) . . 16

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**On Petition For A Writ Of Certiorari
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BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

Amicus Curiae Council on Religious Freedom is a non-profit corporation formed to uphold and promote the principles of religious liberty. Its Board of Directors is composed of individuals who are active in religious affairs in both official and lay capacities, and who recognize the importance of preserving and promoting constitutional principles embodied in the Religion Clauses of the First

Amendment and opposing governmental and non-governmental actions that impinge on the free exercise of religion.

The Council on Religious Freedom is interested in this case because it believes that any erosion of the principles established by this Court in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and its progeny and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), will have not only an unsettling effect on religious freedom, but also will set the stage for limitation and denial of basic free exercise rights guaranteed by the First Amendment to the United States Constitution. *Amicus* seeks to bring to the attention of this Court the importance this nation's religious communities put on the compelling state interest/least restrictive alternative test uniformly utilized by this Court in free exercise cases since the 1963 *Sherbert* decision.

SUMMARY OF ARGUMENT

This Court's decisions in cases brought under the Religion Clauses of the First Amendment, as applied to the facts of this case, mandate that Native Americans must have the right to the sacramental use of peyote. Other federal state constitutional cases involving sacramental use of peyote, federal regulations, and our national experience during Prohibition, when wine, like peyote a drug, was exempt from the Volstead Act for sacramental use, show that the sincere sacramental use of peyote can be accommodated under the Free Exercise Clause of the First Amendment. For this Court to rule otherwise, *Amicus* respectfully suggests, would demonstrate an almost incomprehensible intolerance of Native American religious practices that would severely tarnish the concept that the Free Exercise Clause of the First Amendment protects the freedom of religion of all faiths, including some that may have preceded traditional Judeo-Christian denominations on this continent by hundreds of years, if not millennia.

ARGUMENT

I.

THE PUBLIC INTEREST IN CONTROLLING THE USE AND AVAILABILITY OF DANGEROUS DRUGS IS ADMITTEDLY COMPELLING; HOWEVER, THIS FACT IN AND OF ITSELF SHOULD NOT DETERMINE THE OUTCOME OF THIS CASE.

The State of Oregon argues that by classifying peyote as a Schedule I substance, its legislature has determined peyote to be at the top of the list of dangerous drugs and narcotics. Petitioners' Brief at 15. But neither the fact that there is a substantial public interest in the control of the use and availability of a dangerous drug nor the fact that the use of such drug is prohibited by state criminal law should be determinative of whether Respondents are entitled to receive unemployment compensation after their discharge from employment because of the use of peyote as part of a religious sacrament.

In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), this Court ruled that unemployment benefits could not be denied a worker who refused to accept employment that would have required her to work on her Sabbath in violation of her religious beliefs. For 26 years *Sherbert* has stood as a landmark in the field of religious free exercise. And through those years this Court has reaffirmed the *Sherbert* principles in such cases as *Thomas* v. *Review Board*, 450 U.S. 707 (1981); *Hobbie* v. *Unemployment Appeals Commission of Florida*, 107 S. Ct. 1046 (1987); and, most recently, in *Frazee* v. *Illinois Dept. of Employment Security*, 109 S. Ct. 1514 (1989).

Admittedly, neither *Sherbert*, *Thomas*, *Hobbie*, nor *Frazee* involved religious adherents who were violating state criminal laws. However, this Court directly addressed a conflict between free exercise claims and a universally recognized public interest regulated by a state's criminal code in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). There the question was whether the Free Exercise Clause of the First Amendment protected Jonas Yoder and Wallace Miller, members of the Old Order Amish religion, and Adin Yutzy, member of the Conservative Amish Mennonite Church, who had been convicted of violating Wisconsin's compulsory school attendance law that required parents to school their children until the age of 16. *Id.* at 207-08.

Testimony in *Yoder* showed that the parents believed, in accordance with the tenets of Old Order Amish communities generally, that their children's attendance at high school was contrary to the Amish religion and their way of life. The State stipulated that the religious beliefs of the Amish were sincere. *Id.* at 209.

This Court in *Yoder* specifically noted that the Amish are devoted to a life in harmony with nature and the soil, as exemplified by the simple life of the early Christian era and here in America during much of our colonial and early national history. This Court further noted that the Old Order Amish religion pervades and determines the entire mode of life of its adherents. *Id.* at 210.

The Wisconsin trial court in *Yoder* had found that the state's compulsory school attendance law "does not interfere with the freedom of the Defendants to act in accordance with their sincere religious belief." It also had concluded that the requirement of high school attendance until the age of 16 was a "reasonable and constitutional" exercise of governmental power. *Id.* at 213. The Wisconsin Supreme Court, however, reversed and upheld the parents' claim that their rights under the Free Exercise Clause of the First Amendment had been violated. *Id.* The Wisconsin Supreme Court "was of the opinion that the State had failed to make an adequate showing that its interest in establishing and maintaining an educational system overrides the defendants' right to the free exercise of their religion.'" *Id.*

This Court in *Yoder* specifically stated that "[t]here is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education." *Id.* It noted that "[p]roviding public schools ranks at the very apex of the function of a State." *Id.* This Court, however, found that "a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children . . . ." *Id.* at 214.

The *Yoder* Court, in applying the free exercise balancing test, stated:

> It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.

Id.

Then, in deciding how to weigh the free exercise claims of the convicted parents against the State's admitted interest in compulsory education, this Court said:

> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. We can accept it as settled, therefore, that however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.

Id. at 215.

A regulation can burden the free exercise of religion not only by infringing on beliefs but also by restricting religiously-grounded conduct. As this Court said in *Yoder*, "[T]here are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulation of general applicability." *Id.* at 220.

In *Sherbert* v. *Verner*, 374 U.S. at 406, this Court announced the test to be applied in cases involving free exercise claims. In that case this Court stated that once it is established that a burden exists on free exercise rights,

> [i]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation." [citation omitted]

This Court noted that those religiously-motivated activities which the Court found susceptible to state regulation "invariably posed some substantial threat to public safety, peace or order." *Id.* at 403.

This Court in *Sherbert* continued by adding a second element to the test. It held that even when the state interest being served was of the requisite compelling nature, "it would plainly be incumbent upon the [State] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Id.* at 407.

This Court was even more succinct in restating the *Sherbert/Yoder* test in *Thomas* v. *Review Board*, 450 U.S. 707, 718 (1981): "The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."

A crucial aspect of the *Sherbert* test is the allocation of the burden of proof. The party asserting the First Amendment free exercise right must prove the existence of a *sincerely held* religious belief and the existence of a burden placed upon that belief by the government regulation. The burden may be either direct or indirect. *Sherbert*, 374 U.S. at 404, and *Thomas*, 450 U.S. at 718.

Once this burden has been met by the religious claimant, the burden shifts to the state to demonstrate the compelling nature of the interest to be promoted by the law or regulation and that the state has used the least restrictive means to accomplish its end. *Hobbie* v. *Unemployment Appeals Commission*, 107 S. Ct. 1046, 1049 (1987).

Amicus assumes that such explicit and often repeated formulation of this Court's Free Exercise test, the foundation of its *Sherbert*, *Thomas*, *Hobbie*, *Frazee*, and *Yoder* decisions, is indeed substantive and not mere dicta to be cast aside by some changing philosophical or political breeze wafting through its chambers. *See* contrasting views of Justices Scalia and Blackmun in the commercial speech context of *State University of New York* v. *Fox*, ___ U.S. ___, 57 U.S.L.W. 5015, 5018 and 5020 (U.S. 1989).

Other important principles of free exercise jurisprudence should apply to this case. First, "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion. *Yoder*, 406 U.S. at 220. In *Bowen* v. *Roy*, 106 S. Ct. 2147 (1986), this Court raised some doubts as to the burden of proof the State must meet in order to justify the application of a facially neutral statute in a way that burdens the free exercise of religion.

> In the enforcement of a facially neutral and uniformly applicable requirement for the administration of welfare programs reaching many millions of people, the Government is entitled to wide latitude. The Government should not be put to the strict test applied by the district court; that standard required the Government to justify enforcement of the use of a Social Security number requirement as the least restrictive means of accomplishing a compelling state interest. Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest.

Id. at 2156.

But just eight months later this Court strongly clarified its position in *Hobbie* v. *Unemployment Appeals Commission*, 107 S. Ct. 1046 (1987). Referring to *Bowen* v. *Roy* language quoted above, this Court in *Hobbie* explained:

> Five justices expressly rejected this argument in *Roy* . . . . We reject the argument again today. As Justice O'Connor pointed out in *Roy*, "[s]uch a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides."

Id. at 1049.

In light of this Court's decision in *Hobbie*, Justice O'Connor's opinion (concurring in part, dissenting in part) in *Roy* is instructive. "This Court has consistently asked the government to demonstrate that unbending application of its regulation to the religious objector is essential to accomplish an overriding governmental interest.'" 106 S. Ct. 2166-2167. Therefore, a state does not meet its burden merely by showing a compelling interest in the subject matter of the regulation. It must show an interest in applying the regulation in the case at bar. "[D]espite its admitted validity in the generality of cases, we must searchingly examine the interest that the State seeks to promote . . . and the impediment to those objectives that would flow from recognizing the claimed . . . exemption." *Yoder*, 406 U.S. at 221.

So far as *Amicus* is aware, the State of Oregon has not challenged the sincerity of respondents' religious beliefs which are burdened by the state's actions in denying unemployment compensation to them. *Amicus* also believes that the state has completely failed to establish a record demonstrating that judicially acknowledging the constitutional exemption from the state's criminal laws for the historically-based religious sacramental use of peyote to Native Americans would result in an impairment to the state's generally recognized interest in preventing the use of peyote as a controlled substance.

II.

GOVERNMENT MAY ACCOMMODATE THE RELIGIOUS USE OF REGULATED DANGEROUS DRUGS BY THE PROPER APPLICATION OF THE COMPELLING STATE INTEREST/LEAST RESTRICTIVE ALTERNATIVE TEST.

The State of Oregon unpersuasively argues that "government cannot accommodate religious use exemptions from criminal laws regulating dangerous drugs," even though acknowledging that "[i]f government can allow a religion-based exemption without compromising its interests, the Free Exercise Clause requires it to do so." Petitioners' Brief at 16.

In an apparent attempt to make up for the lack of proof in the record, the state strives to marshall a number of arguments which, on careful analysis, fail to carry much weight. The state basically argues that it cannot accommodate Native Americans in the sacramental use of peyote for the following reasons:

A) Regulations such as those involving the regulation of dangerous drugs which serve health, safety, and public order interests require uniformity and comprehensiveness in their application to be effective;

B) The granting of religion-by-religion exemptions from facially neutral laws raises the potential for government to discriminate among religions in violation of the Establishment Clause;

C) The only means by which the state can insure responsible ingestion of peyote in a religious service would require government to monitor the ceremony itself, thus requiring excessive entanglement between church and state;

D) The requiring of government to accommodate ad hoc religious use exemptions would weaken the entire fabric of the nation's controlled substance law;

E) Every criminal defendant who seeks false refuge in the Free Exercise Clause would shift a heavy, perhaps insurmountable, burden on the government to disprove a free exercise defense;

F) Under the Free Exercise Clause the door to religious drug use must be open fully if it is opened at all; and

G) If the narrow religious sacramental exception were permitted, society would become obligated to "accommodate" religious practices in work places, and general programs and in other public and private settings.

First, the decision of the California Supreme Court in *People* v. *Woody*, 61 Cal. 2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964), twenty-five years ago specifically acknowledged a constitutionally-required religious exemption from the State's controlled substance statute in a case involving Native Americans utilizing peyote sacramentally in religious services. It can hardly be argued that the floodgates have been opened by *Woody*, and the courts apparently have been able to apply the compelling state interest/least restrictive alternative analysis without great difficulty. For instance, a federal court of appeals recently noted that the Drug Enforcement Administration seized only 19.4 pounds of peyote between 1980 and 1987 while it seized more than 15.3 *million* pounds of marijuana. Concluded the court: "This overwhelming difference explains why an accommodation can be made for a religious organization which uses peyote in circumscribed ceremonies and not for a religion which espouses continual use of marijuana." *Olsen* v. *Drug Enforcement Administration*, No. 86-1442 (D.C. Cir. Feb. 7, 1989) (1989 WL 65283). Courts are able to balance the free exercise rights of Native Americans against admitted state interests in prohibiting the use and sale of dangerous drugs.

In addition, sacramental use of peyote by Native Americans isn't akin to auto mechanics or lawyers gulping an aspirin or two while on the job. Sacramental use of peyote, complete with altar and deep spiritual meaning, is more akin to complex communion rituals conducted in many mainstream Christian churches. Here's how one author, critically acclaimed by Native Americans for his sensitivity to their culture, described a Navajo peyote sacrament:

> The packed earthen floor had been cleared of furnishings. The peyote altar had been built across the back of it—a low crescent shape of hard-packed sand. The peyote moon, they called it. At its center, where the sand was perhaps six inches high, a cup-sized bed of cedar twigs had been built. In this nest the gnarled, hairy shape of a peyote button rested. On the sand beside it was a small silver box, lid open. Behind the peyote moon two zigzag lines were inscribed in the earth, representing the footprints of Christ. The Native American Church . . . was more or less Christian. Christ taught the white man only through the Bible, because the white man had crucified him. But the Navajo, who had not harmed Christ, God instructed directly through visions. And Lord Peyote was the instrument, the key to the door which led to reality.

T. Hillerman, *People of Darkness* 153 (1980).

The key to the effective balancing process has been almost unfailing judicial application of the first two parts of the free exercise test, which require that a claimant demonstrate a sincerely-held religious belief as well as a governmental burden on that belief. In *People* v. *Woody*, the California Supreme Court, citing this Court's decision in *United States* v. *Ballard*, 322 U.S. 78 (1944), stated:

> Although judicial examination of the truth or validity of religious belief is foreclosed by the First Amendment, the courts of necessity must ask whether the claimant holds his belief honestly and in good faith or whether he seeks to wear the mantle of religious immunity merely as a cloak for religious activity.

394 P.2d at 821.

Contrary to the assertion of the State of Oregon in this case, the California Supreme Court in *Woody* correctly recognized that in determining sincerity, "the court makes a factual examination of the bona fides of the belief and does not intrude into the religious issue at all; it does not determine the nature of the belief but the nature of defendant's adherence to it." *Id.*

In *Thomas* v. *Review Bd.*, 450 U.S. at 713-14, this Court, citing *Sherbert* and *Yoder*, found:

> Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, give special protection to the exercise of religion. The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task, as the division of the Indiana Supreme Court attests. However, the resolution of that question is not to turn upon a judicial perception of the belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.

The *Thomas* Court clearly recognized that it is constitutionally permissible for courts to determine that a belief is not religiously rooted, although it noted that "courts are not arbiters of scriptural interpretation," *id.* at 716, and that some claims "so bizarre, so clearly non-religious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Id.* at 715. *Amicus* believes that when there is generally accepted recognition of a governmental interest to regulate an area of public concern, in weighing the governmental interest against the free exercise claim, it is not improper for the court to examine the "degree of abridgement of religious freedom involved." *People* v. *Woody*, 394 P. 2d at 820.

As recent as March, 1989, this Court in *Frazee* v. *Illinois Dept. of Employment Security*, 109 S. Ct. at 1517, devoted much of its opinion to analyzing the basis of Frazee's contention that he could not work on Sunday as scheduled by his employer. This Court found: "Our judgments in these cases [*Sherbert*, *Thomas*, and *Hobbie*] rested on the fact that each of the claimants had a sincere belief that religion required him or her to refrain from the work in question." And in *Hobbie*, 480 U.S. at 144, this Court said its constitutional concern in *Sherbert* and subsequent cases has been based upon the fact that the employee seeking unemployment compensation was "forced to choose between fidelity to religious beliefs and . . . employment." This Court added that in those cases it "found the forfeitures of unemployment benefits for choosing the former over the latter brings unlawful coercion to bear on the employee's choice.'" *Id.* at 517.

In fashioning the least restrictive alternative under the facts in this case, this Court may insist that the use of peyote be confined to its sacramental use during regular religious services, thus narrowly confining the extent, time, and location of its use. Therefore, the religious accommodation provided by judicial recognition of the limited use of peyote for sacramental purposes will not result in the introduction of such a drug into the work

place and in other public or private settings away from the site of religious worship.

Several of the State of Oregon's arguments boil down to the proposition that drug enforcement will fall apart if a religious exemption is permitted for the sacramental use of peyote. This argument seems particularly unpersuasive in light of the fact that after the decision in *People* v. *Woody*, the Attorney General of the United States, with apparent congressional approval, adopted a regulation making the Federal Controlled Substances Act, which classified peyote as a Schedule I controlled substance, inapplicable "to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church." *See Peyote Way Church of God, Inc.* v. *Smith*, 742 F.2d 193 (5th Cir. 1984). 21 C.F.R. § 1307.31 (1984) reads:

> The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the North American Church, and members of the Native American Church so using peyote are exempt from registration. Any person who manufactures peyote for or distributes peyote to the Native American Church, however, is required to obtain registration annually and to comply with all other requirements of law.[1]

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[1] Oregon's statutory prohibition against the use of peyote is apparently the result of the Oregon legislature adopting the federal schedule (Petitioners' Brief at 15, n.9). The state thus makes the curious argument of contending that the religious use of peyote by a Native American as an integral part of a religious service is not constitutionally exempt from the Oregon statute even though the Congress of the United States and the Attorney General apparently agreed that the Free Exercise Clause of the First Amendment should provide such an exemption when Congress adopted the schedules of controlled substances.

The narrow constitutional exemption for the use of peyote by Native Americans for sacramental purposes would appear to already be embedded in our constitutional history after at least 25 years of generally favorable treatment of such a free exercise claim. Professor Tribe, in analyzing the constitutionally balancing process, wrote:

> If the harm is grave enough, the issue raised is the power of the state to mandate life and forbid risk-taking. . . . If the harm is ill-defined or plainly not serious, the case seems clearer than *Yoder*: an exemption must be granted. *People* v. *Woody*, where the California Supreme Court found unconstitutional the conviction of American Indians for the religious use of peyote, is one such case. Insofar as the government advanced arguments beyond harm to self—controlling overall drug traffic, for example—less restrictive alternatives for dealing with the problem were clearly available. The one argument which could not be so easily met was the contention that drug use is harmful to the user—that a hallucinogenic experience, for example, is bad in itself. But at this point, the state is telling the individual that it knows what is best for his body and mind. Surely the individual may respond, "I know what is best for my soul." To allow the government thus to impose the World of the Flesh upon the World of the Spirit seems an overwhelming abridgment of religious freedom.

L. Tribe, *American Constitutional Law* 1269-70 (2d ed. 1988).

The state in its brief repeatedly makes the point that this is an unemployment case and not a criminal prosecution. Petitioners' Brief at 8 and 33. That statement makes a strong argument against the state's claim that every criminal defendant who seeks false refuge in the Free Exercise Clause would shift a heavy, perhaps insurmountable, burden on the government to disprove a free exercise defense in prosecuting drug law violators. Why, *Amicus* asks, did it take an unemployment compensation case to raise the issue in this Court as to whether the sacramental use of peyote or any hallucinogenic drug by Native Americans in their religious services is protected by the Free Exercise Clause of the First Amendment? Why, since *People* v. *Woody* some 25 years ago, has it taken this long for this Court to address this issue if the problem is of the magnitude claimed by the State of Oregon? *Amicus* believes that the answer is clear. The analysis of the California Supreme Court in *People* v. *Woody* is sound. Courts can and do sift the sincere from the fraudulent. *Amicus* believes that 25 years of sensitive state and federal judicial application of this Court's free exercise test has provided the proper balance between the interests of the states and the interests of individuals seeking to practice their religious beliefs. The California Supreme Court in *People* v. *Woody* expressed it well when it said:

> We know that some will urge that it is more important to subserve the rigorous enforcement of the narcotic laws than to carve out of them an exception for a few believers in a strange faith. They will say that the exception may produce problems of enforcement and that the dictate of the State must overcome the beliefs of a minority of Indians. But the problems of enforcement here do not inherently differ from those of other situations which call for the detection of fraud. On the other hand, the right to free religious expression embodies a precious heritage of our history. In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty.

Id. at 821.

Amicus' final free exercise argument is that this Court should consider the Noble Experiment—also called Prohibition—conducted earlier this century by this great country against alcohol, like peyote a drug.

From 1920 to 1933, firmly anchored on the newly adopted Eighteenth Amendment to the Constitution, federal law made it a criminal activity to "manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor *except . . . wine for sacramental purposes.*" Volstead Act, 41 Stat. 308 (1919), 27 U.S.C.A. §§ 12 (1927) (emphasis added).

If federal law during the conservative era of Prohibition protected the free exercise of religion by exempting sacramental use of wine, this Court, in an era of insensitivity to the religious practices of Native Americans, likewise should conserve a limited right under the Free Exercise Clause of the First Amendment to the sacramental use of peyote without threat of deprivation of unemployment compensation benefits. To rule otherwise, *Amicus* respectfully suggests, would demonstrate an almost incomprehensible intolerance of Native American religious practices that would severely tarnish the concept that the Free Exercise Clause of the First Amendment protects the freedom of religion of all faiths, including some that may have preceded traditional Judeo-Christian denominations on this continent by hundreds of years, if not millennia. *Amicus* cannot imagine that this Court during Prohibition would have denied unemployment compensation to a Christian who had been fired by a Prohibitionist employer after the employee partook of wine at a communion service.

III.

CONTRARY TO THE STATE'S ASSERTION, THERE IS NO VIOLATION OF THE ESTABLISHMENT CLAUSE IN APPLYING FREE EXERCISE PRINCIPLES ON A CASE-BY-CASE BASIS.

The State of Oregon argues that a case-by-case determination of the application of the Free Exercise Clause by necessity results in discrimination among religions. *Amicus*, however, believes that the application of the compelling state interest/least restrictive alternative test, if uniformly applied, necessarily guarantees that no particular religious belief will be preferred. Of course, the application of the test utilized in *Sherbert* and *Yoder* may result in some free exercise claims being rejected and some accepted. Nevertheless, the even-handed application of the test results in the required neutrality which the Religion Clauses of First Amendment require of government, be it the executive, legislative, or judicial branch. It is the state in this case that seeks to burden members of one religious group because of their religious practices.

Any time a court seeks to balance the interests of the state against the religious claim of an individual, it by necessity does a case-by-case analysis. If the test itself remains constant, the Court preserves the core principle of neutrality toward religious freedom found in the Religion Clauses of the First Amendment. This Court in *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984), stated that the Constitution "affirmatively mandates accommodation, not merely tolerance of all religions and forbids hostility toward any. . . . Anything less would require the callous indifference' we have said was never intended by the Establishment Clause. . . . Indeed, we have observed such hostility would bring us into war with our national tradition as embodied in the First Amendment's guarantee of the free exercise of religion.'"

Amicus recommends to this Court these words of Justices Goldberg and Harlan, in *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 305 (1963), (concurring): "The basic purpose of the religion clauses of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end."

CONCLUSION

For the foregoing reasons, the decision of the Oregon Supreme Court should be sustained.

Dated: July 14, 1989

Respectfully submitted,

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AMICUS CURIAE

BRIEF

6

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No. 88-1213

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1988

EMPLOYMENT DIVISION,
DEPARTMENT OF HUMAN RESOURCES,
of the STATE OF OREGON
W.E. HUNTER, Administrator,

Petitioner,

v.

ALFRED SMITH,
GALEN W. BLACK, and ADAPT,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OREGON

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CHURCH OF OKLAHOMA,
NATIVE AMERICAN CHURCH OF OKLAHOMA,
NATIVE AMERICAN CHURCH OF THE OMAHA TRIBE,
NATIVE AMERICAN CHURCH OF SOUTH DAKOTA,
AND THE NATIVE AMERICAN CHURCH OF
WINNEBAGO, NEBRASKA

This brief is dedicated to the work of Dr. Omer C. Stewart, Professor of Anthropology, University of Colorado, Boulder, Colorado, who has selflessly committed his life's energy to the "stubborn fight for what Americans generally take for granted: religious freedom" for Indian peyotists. Dr. Stewart has spent most of the past 50 years tracing, in painstaking detail, the history of the Peyote Religion, to one end:

"The truth shall make ye free." John 8:32

TABLE OF CONTENTS

PAGE

INTEREST OF AMICI CURIAE....................2

SUMMARY OF ARGUMENT........................7

ARGUMENT...................................12

I. PEYOTISM HAS A LONG ESTABLISHED HISTORY AS A NATIVE AMERICAN RELIGION...........................12

II. CONTEMPORARY FEDERAL PEYOTE LAW AND POLICY SUPPORTS AN EXEMPTION FROM DRUG LAWS FOR THE RELIGIOUS USE OF PEYOTE BY NATIVE AMERICAN CHURCH MEMBERS.............................24

III. THE NATIVE AMERICAN CHURCH HAS A STRONG MORAL AND THEOLOGICAL CODE IN WHICH PEYOTE PLAYS A CENTRAL ROLE................................29

IV. THE FIRST AMENDMENT RIGHTS OF NATIVE AMERICAN CHURCH MEMBERS SUPERSEDE ANY LEGITIMATE STATE GOVERNMENTAL INTERESTS THAT MAY BE PRESENT IN THIS CASE.......34

A. The First Amendment is designed to protect minority religions from deliberate or inadvertent interference by the majority.......................34

B. Oregon has no compelling interest which would justify the prohibition of religious peyote use by Native American Church members........................40

CONCLUSION...............................59

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Allegheny County v. Greater Pittsburgh ACLU, 57 U.S.L.W. 5045 (1989)..................................35

Board of Education v. Barrette, 319 U.S. 624 (1943)......................37

Bowen v. Roy, 476 U.S. 693 (1986)..................37, 56, 57, 58, 59

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Brown v. Board of Education, 347 U.S. 483 (1954)......................42

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CASES (Cont.) **PAGE(S)**

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Olsen v. DEA, __ F.2d __, 1989 WL 65278 (D.C. Cir. 1989).............. Passim

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FEDERAL STATUTES (Cont.) **PAGE(S)**

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STATE STATUTES (Cont.) **PAGE(S)**

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No. 88-1213

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

EMPLOYMENT DIVISION,
DEPARTMENT OF HUMAN RESOURCES,
of the STATE OF OREGON
W.E. HUNTER, Administrator,

Petitioner,

v.

ALFRED SMITH,
GALEN W. BLACK, and ADAPT,

Respondents.

Pursuant to Rule 36.2 of the Rules of the Supreme Court of the United States, the Association on American Indian Affairs, 95 Madison Avenue, New York, New York 10016; Native American Church of North America, Box 1032, Shiprock, New Mexico 87420; Native American Church of Colorado, 4407

Morrison Road, Denver, Colorado 80219; Native American Church of Oklahoma, 1306 North Washington, #2, Weatherford, Oklahoma 72096; Kiowa Chapter of the Native American Church of Oklahoma, P.O. Box 548, Carnegie, Oklahoma 73015; Native American Church of South Dakota, Box 175, Walthill, Nebraska 68067; Native American Church of the Omaha Tribe, Box 175, Walthill, Nebraska 68067; and Native American Church of Winnebago, Nebraska, P.O. Box 447, Winnebago, Nebraska 68781 file the attached brief *amici curiae* in support of Respondents in the above-captioned case. Both parties have consented in writing to the filing of this brief; said letters of consent accompany this brief, as required by Rule 36.

INTEREST OF AMICI CURIAE

The Association on American Indian Affairs, Inc. (AAIA) is a non-profit membership corporation organized under the

laws of the State of New York for the purpose of protecting and enhancing the self-government rights and culture of American Indians and Alaska Natives. For many years, the Association has been the largest Indian-interest organization with a nationwide membership that consists of both Indians and non-Indians. The Association has long been involved in efforts to protect the religious freedom of Native Americans including efforts to return the sacred Blue Lake to the Taos Pueblo, and the filing of *amicus curiae* briefs with this Court in major cases affecting Indian religious rights, including *Lyng v. Northwest Indian Cemetery Association*, 485 U.S. ____, (1988) and *United States v. Dion*, 476 U.S. 734 (1986).

The Native American Church of North America (NACNA) was incorporated under the laws of the State of Oklahoma, originally filed with the Oklahoma Secretary of State, on April 17, 1950. By 1955, thirteen state chapters of the Native American Church of North America had incorporated under the laws of their respective states. Most Native American Church groups are affiliated with the NACNA. Today incorporated groups exist in seventeen states, including the State of Texas in which exists the only source of supply of peyote in the United States.

All of the other Chapters who have signed on as *amici* espouse to similar principles and, consequently, their interests in supporting respondents are the same.

The purpose of NACNA is stated in Article 2 of the Articles of Incorporation, as follows:

> "The purpose of this Church shall be to foster and promote religious belief in Almighty God and the customs of the several tribes of Indians throughout North America in the worship of a Heavenly Father; to promote morality, sobriety, industry, charity and right living; and to cultivate a spirit of self-respect and brotherly love and union among the members of the several tribes throughout North America. . . ."

In recent years, the movement back to traditional Indian lifestyles has contributed greatly to the increased membership in the Native American Church. Present estimates by officials of the Church are uncertain but put the figure in excess of 100,000 members. The majority of these members reside in those eighteen states having significant Indian populations.

The sacramental use of peyote in the rites of the Native American Church is very complex and not given to simple explanation. To the members, peyote is consecrated with powers to heal body, mind and spirit. It is a teacher; it teaches the way to spiritual life through living in harmony and balance with the forces of the Creation.

The rituals are an integral part of the life process. They embody a form of worship in which the sacrament Peyote is the means for communicating with the Great Spirit. Just as everything must be complete in and of itself, the rites include an appropriate sequence of ceremonial forms. Through prayer and meditation, the participants prepare themselves to receive the powers of healing and cleansing; through the music and testimonials, they exalt their Creator.

The Indian way of life is based on their holistic philosophy of the universe in which everything is predestined and interdependent. Reciprocal relationships are fostered and maintained through respect

for all of creation. In this experiential existence, they attempt to live in concert with the forces of nature and with other human beings.

It is for these reasons *amici* are gravely concerned about the claims proffered by the State of Oregon in this case. Contrary to the state's claims, the use of peyote in a religious ceremony strictly controlled by religious leaders has been the only means of spiritual salvation and regeneration for many Native American people.

SUMMARY OF ARGUMENT

The Peyote Religion, or Peyotism, is one of the oldest continuously practiced religions in the Western Hemisphere. Its roots have been documented back at least ten thousand years *before* the discovery of the North American continent, to the aboriginal people of the lower Rio Grande

River in the continental United States and Mexico who were familiar with peyote and its spiritual qualities.

The Native American Church ("NAC"), comprised of the national organization and numerous state and local chapters, is the contemporary embodiment of the Peyote Religion. Non-Indians are practicing members of some Church chapters, but many chapters restrict membership to persons of Indian descent.

Peyote is the central sacrament of NAC ceremonies; without peyote Church ceremonies simply could not take place. Peyote is believed to embody a spiritual deity; and the ingestion of the peyote assists participants in communicating directly with the Creator.

The Native American Church, despite centuries of suppression in Mexico and the United States, has proven its resilience

for the very reason that it fulfills the spiritual needs of its members. Peyote use by Church members has been proven to enhance their ability to confront and effectively deal with life's emotional, psychological and spiritual challenges. Indeed, widespread pharmacological and anthropological evidence strongly supports the positive effects of peyote use in a controlled religious ceremonial setting as the most effective means for combatting the negative effects of alcoholism. Contrary to assertions by the State of Oregon, peyote use in NAC ceremonies does not provide an alcoholic or drug addict with a means of escape from reality through alternative substance abuse.

The Congress and numerous state legislatures, as well as state and federal courts, have all found the use of peyote in *bona fide* NAC ceremonies to present no real public health or security threat. The United States Drug Enforcement Agency has similarly allowed by promulgated rule, the regulated transportation and distribution of peyote for *bona fide* NAC ceremonies for two and one-half decades. Informal arrangements were established and respected for decades prior to that.

The First Amendment provides protection to minority religions against the vicissitudes of the majority. Indirect and inadvertent impact upon religious freedom rights is prohibited as well as deliberate inference unless the federal government has a compelling interest and no less restrictive alternative. The government's interest must be measured in terms of whether a religious prevention would prevent the government from meeting its legitimate goals, and not merely based upon broad undocumented assertions.

In this case, Oregon's purported interest is based on general hyperbole without documentation nor any substantive showing as to how a peyote exemption would derail effective enforcement of Oregon's drug laws (assuming *arguendo* that any such interest is present in this case notwithstanding the contrary finding by the Oregon Supreme Court). Chemical substance abuse has reached crisis proportions in the United States and elsewhere in the world. *Amici* recognize and appreciate the magnitude of the problem. But *amici* view as patently offensive the State of Oregon's efforts in this case to engender unwarranted emotional hysteria over controlled peyote ingestion in legitimate NAC ceremonies. For the NAC and its various chapters and its membership at large, peyote use is not a "problem" but a means of salvation. The State of Oregon can only manufacture rank speculation based on misrepresentation of fact to assert otherwise. The precedents of this Court mandate a finding that the First Amendment rights of NAC members supercede any state interest in a blanket prohibition against peyote.

ARGUMENT

I. PEYOTISM HAS A LONG ESTABLISHED HISTORY AS A NATIVE AMERICAN RELIGION

It is generally agreed by anthropologists and ethnohistorians that the indigenous people of the Rio Grande River valley in present-day Mexico and the State of Texas were the first to become aware of and use peyote for medicinal and spiritual purposes, as long as ten thousand years ago.[1] By the time of the Spanish Conquest of Mexico and first written records of its use, peyote was known far beyond its natural habitat, extending as far south as Oaxaca, throughout central Mexico, and as far north as Santa Fe, New Mexico.[2]

First written accounts describe peyote use by the Indians of Mexico - including the Aztec, the Chichimec, the Zacateco, the Tlasculau and several dozen other tribal groups - for medicinal, pharmacological and spiritual purposes.[3] Both individual and group spiritual uses of peyote were common.[4] A tribute to the widespread

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[1] *See* Stewart, Omer C., *Peyote Religion: A History*, Chapter 2, pp. 16-44 (University of Oklahoma Press, Norman 1987) (hereinafter referred to as "Stewart"); *and generally* LaBarre, (Cont. on next page.)

[1] (Cont.) *Weston, The Peyote Cult* (New York 1969); Slotkin, J.S., *The Peyote Religion*, (Free Press, Glencoe Illinois 1956); Slotkin, J.S., *The Peyote Religion: A Study In Indian White Relations*, (New York 1975).

[2] Stewart, *id.*

[3] Stewart, *id.*

[4] Stewart, *id.*

importance of peyotism, among both "pagan" Indians and Catholic converts, was the Catholic Church's efforts to arrest its use. The Spanish Inquisition issued an edict in 1620 declaring the ingestion of peyote to be an "act of superstition condemned as opposed to the purity and integrity of our Holy Catholic Faith. . . ." Past sinners were granted absolution; but severe repercussions such as that delivered against those "suspected of heresy to our Holy Catholic Faith" were taken against "disobedient and recalcitrant" individuals.[5]

At the same time Plains Indians from America were acquiring the horse, thereby enabling them to more easily venture into

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[5] Ramo de Inquisicion, tomo 289, Archivo General de la Nacion, Mexico City; *quoted in* Leonard, Irving A., "Decree Against Peyote, Mexican Inquisition, 1620." 44 *American Anthropologist* 324-36 (1942).

northern Mexico, and learn of new things such as peyote.[6] Although the historic evidence is mixed, the Caddo Indians of the Texas-Louisiana area were reported by Catholic missionaries in the early 18th Century to have introduced peyote into their religious ceremonies.[7] And similar accounts are common of peyote use by other tribes in the Texas-New Mexico region, including the Carrizo Coahuilteco, Lipan Apache, the Mescalero Apache, the Tonkawa and the Karankawa.[8]

Stewart describes the early peyote ceremony thought to predominate in the Texas, Oklahoma and New Mexico tribes:

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[6] Stewart, *id.*

[7] Swanton, John R., "Source Material on the History of the Caddo Indians," *Bureau of American Ethnology Bulletin*, No. 132, pp. 51-52, 120-21, 210, 265-71. Washington, D.C., U.S. Gov't. Printing Office, *quoted in* Stewart at pp. 27-8.

[8] Stewart, pp. 45-51.

> It was an affair of family and friends, with singing and praying, and for all its strangeness to outsiders, to its participants it carried a high moral tone, such as might characterize a mission service. While no Christian symbol, with the possible exception of the cross, can be found in early peyote ceremonies, they might be said to have had a certain Christian ambience.[9]

Over time, peyotism eventually worked its way throughout much of Indian Country in the western United States. Acceptance of the religion varied from tribe to tribe, depending on a multitude of factors: "the varied and broken histories of tribes, the varieties of languages and customs, the efforts of the Christian missionaries and government authorities to suppress, as well as the abilities of peyote missionaries influenced its acceptance."[10] Stewart

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[9] Stewart, pp. 51-2.

[10] Stewart, p. 97.

describes in great detail the history of the introduction and spread of peyotism in Oklahoma among such diverse tribes as the Cheyenne, Arapaho, Osage, Ponca, Quapaw, Tonkawa, Delaware, Otoe, Pawnee, Sac and Fox, Shawnee and Iowa Tribes, and the Kickapoo Bands of Oklahoma, Kansas and Mexico.[11] In summary, he notes:

> By 1910 peyotism had become well established among the Indians of Oklahoma, with the exception for the most part of the Five Civilized Tribes. Nearly all of those [Indians] arriving after 1874 had taken it up to some extent. It spread by word of mouth, from person to person, as well as deliberately by a few dedicated believers and some self-seeking missionaries. It survived the early antagonisms of the establishment. And it changed a little as each new roadman expressed his personality in guiding the ritual, but it remained basically true to the form and spirit of its beginning.[12]

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[11] Stewart, pp. 97-127.

[12] Stewart, p. 127.

In general, the introduction of peyote to western tribes such as the Winnebago and Omaha of Nebraska, the Potawatomie, Sac and Fox, Kickapoo and Iowa Tribes of Kansas, the Crow of Montana, the Sioux of the Dakota Territory, the Gosuite and Western Shoshone, Washo, and Northern and Southern Paiute of Nevada, and the Navajo came after Oklahoma tribes, as late as the beginning of the twentieth century.[13]

Throughout the late nineteenth and early twentieth centuries efforts were made to suppress the peyote religion, at the federal legislative and administrative

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[13] Stewart, pp. 148-212, 265-317.

levels.[14] These efforts were unsuccessful, because there was little evidence of peyote abuse or of "problems" caused by NAC members. In fact, there was much evidence of the beneficial impact of the religion on its members.

Persuasive opposition to early federal antipeyote legislative efforts came from ethnologists Francis La Flesche and James Mooney of the Smithsonian Institute's Bureau of American Ethnology, La Flesche testified before a House Committee in 1918:

> But suddenly there came a lull in all this drunkenness and lawlessness. I had a sister who was a physician, and her practice was mostly among the Indians, and she wrote me regularly about the conditions of the Omaha people.

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[14] Between 1912 and 1937, twelve bills were introduced in Congress to restrain the peyote religion. All were unsuccessful. Stewart, pp. 213-231. Similar haphazard efforts were undertaken but failed in several Western territories largely driven by the misguided or uninformed preconceptions of individual agents. Stewart, pp. 135-36.

> She was interested and one day I got a letter from her in which she said: "A strange thing as happened among the Omahas. They have quit drinking, and they have taken to a new religion, and members of that new religion say that they will not drink; and the extraordinary part of the thing is that the people pray, and they pray intelligently, they pray to God, they pray to Jesus, and in their prayers they pray for the little ones, and they ask God to bring them up to live sober lives; they ask help of God."
>
> She regarded that as something very strange, because the Indians, although they had missionaries for many years, could not understand the white man's religion; it was too intricate a thing for them, and they could not understand it. But the teaching of this new religion was something they could understand. In connection with this new religion they used a plant called peyote as a sort of sacrament. This peyote, they said, helped them not only to stop drinking, but it also helped them to think intelligently of God and of their relations to Him. At meetings of this new religion is taught the avoidance of stealing, lying, drunkenness, adultery, assaults, the making of false and evil reports against neighbors. People are thought to be kind and loving to one another

> and particularly to the little ones.
>
> The persons who are opposed to the use of peyote by the Indians in their religion say that it makes them immoral. That has not been my observation. The Indians who have taken the new religion strive to live upright, moral lives, and I think their morality can be favorably compared with that of any community of a like number in this country.[15]

This evidence was mirrored by the first-hand accounts of a number of federal Indian agents. For instance:

- Kickapoo agent Frank Thackery (1909): "with peyote there is very rarely any violence shown from its use. . .peyote is used in religious ceremonies and peyotists have stopped the use of alcohol."
- Kaw (Kansas) agent A.R. Miller (1909): "The Indians of this tribe who use peyotes [sic] were formerly hard drinkers, but claim that now they have no appetite for alcohol. . .It [peyote] is used here. . .in

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[15] Stewart, pp. 220-21.

connection with religion."[16]

Notwithstanding substantial evidence of the beneficial effect of the peyote religion, antipeyotists met with more success in securing the passage of state criminal laws. Utah, Colorado and Nevada passed state laws against peyote in 1917. Kansas followed suit in 1919, as did Arizona, Montana, North and South Dakota in 1923; Iowa in 1925; New Mexico and Wyoming in 1929; and Idaho in 1933.[17]

State laws, however, proved largely futile, and did little to impede the spread of peyotism within the NAC. The absence of state court jurisdiction to prosecute on-Indian reservation conduct or activities rendered state law largely ineffectual. Some effort was made to disrupt the

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[16] Stewart, pp. 141-2.

[17] Stewart, pp. 227-29.

transportation of peyote off-reservation where state laws applied, but these efforts were largely unorganized and haphazard, with few results.[18] Significantly, of these twelve states, today all but three - Idaho, North Dakota and Utah - have enacted exemptions to their antipeyote laws for *bona fide* NAC ceremonial use.[19]

The New Deal era of Franklin D. Roosevelt's administration brought new faces and policy to the federal Indian administration. Both Harold L. Ickes, the new Secretary of the Interior, and John Collier, Commissioner of Indian Affairs, were members of the American Indian Defense Association, the predecessor of *amici* Association on American Indian Affairs, and regarded as progressive Indian policy reformers. Collier's Bureau of Indian Affairs Circular No. 2970, entitled "Indian Religious Freedom and Indian Culture," signaled a dramatic change in policy toward peyotists. It said, in part: "No interference with Indian religious life or ceremonial expression will hereafter be tolerated."[20]

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[18] Stewart, pp. 229-30.

[19] *See* Colo. Rev. Stat. §12-22-317(3) (Supp. 1982); Nev. Rev. Stat. Ann. §453.541 (1986); Kan. Stat. Ann. 565-4116(8) (1985); Ariz. Rev. Stat. Ann. §13-3402(B)(1-3) (1981); Mont. Rev. Code Ann. §94-35-123 (1947); S.D. Comp. Laws Ann. §34-20B-14(17) (1977); Iowa Code Ann. §204.204(8) (1987); N. Mex. Stat. Ann. §30-31-6(d) (Supp. 1980); Wyo. Stat. Ann. §35-7-1044 (1977).

II. CONTEMPORARY FEDERAL PEYOTE LAW AND POLICY SUPPORTS AN EXEMPTION FROM DRUG LAWS FOR THE RELIGIOUS USE OF PEYOTE BY NATIVE AMERICAN CHURCH MEMBERS

When Congress finally did successfully legislate against peyote in the 1965 Drug Abuse Control Amendments Act, its intent was clear to proscribe the *non-religious*

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[20] Stewart, pp. 231-32.

use of the drug, thereby leaving open peyote use in *bona fide* NAC ceremonies.[21] Thus, while peyote is listed as a controlled substance on Schedule I of the Controlled Substance Act, 21 U.S.C. §812(c), an express exception is provided in U.S. Drug Enforcement Agency regulation for "the nondrug use of peyote in bona fide religious ceremonies of the Native American Church,. . . ." 21 C.F.R. §1307.31.

Congress expressly confirmed the right to an exception for NAC members' ceremonial peyote use in 1978 with the enactment of the American Indian Religious Freedom Act ("AIRFA"), 42 U.S.C. §1996. AIRFA states the policy of the federal government "to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise [their] traditional religions." *Id.* This expressly includes "use and possession of sacred objects and the freedom to worship through ceremonials and traditional rights." *Id.*

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[21] *See* 111 *Cong. Rec.* 15977 (1965). Native American Church of New York v. United States, 468 F.Supp. 1247 (S.D.N.Y.), *aff'd. mem.*, 633 F.2d 205 (2d Cir. 1980).

That Congress considered peyote to be a "sacred object" within AIRFA's scope is supported by the legislative history. Congress recognized that:

> Although acts of Congress prohibit the use of peyote as a hallucinogen, *it is established Federal law that peyote is constitutionally protected when used by a bona fide religion as a sacrament. Yet, a lack of awareness of understanding of the law has led some Federal officials to confiscate sacramental substances.*

1978 U.S. Code Cong. & Adm. News at 1263 (emphasis added).[22] The AIRFA Federal

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[22] Congress recognized that "natural objects have religious significance because they are sacred, they have power, they heal, they are necessary to the exercise of rites of the religion, they are necessary to the cultural integrity of the tribe and, therefore, religious (Cont. on next page.)

Agencies Task Force Report of August 1979, directed by Section 2 of Senate Joint Resolution 102 (Section 1 of which became AIRFA) documented the widespread federal harassment of Native Americans over their possession and use of peyote for *bona fide* ceremonial purposes of the NAC. *See* AIRFA Report, and Appendix D attached thereto.

In 1986, as amended in 1988, Congress enacted legislation relating to Indian alcohol and drug abuse issues as part of the "Anti-Drug Act of 1986," Pub. L. 99-

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[22] (Cont.) survival or a combination of these reasons." 1978 U.S. Code Cong. & Adm. News 1262, 1263.

570, 100 Stat. 3207.[23] Yet that Act does not alter or affect whatsoever *existing* federal law and policy concerning peyote, thereby leaving intact the current Drug Enforcement Administration exemption for *bona fide* use by the NAC previously embraced by Congress. In short, the Congress and the Executive Branch do not consider Indian use of peyote to be illegal, or threatening to the health, safety and welfare of the American public.

Indeed, the decision in *Olsen v. DEA*, 1989 WL 65278 (D.C. Cir. 1989), is a clear indication that the nation's law enforcement agency does not believe that an exemption for peyote use and possession by NAC members threatens their ability to protect the public health and safety from the scourge of drug abuse. The District of Columbia Circuit Court affirmed a decision of the Drug Enforcement Administration which contrasted the legitimacy of the peyote exemption with a claimed exemption for marijuana use.

III. THE NATIVE AMERICAN CHURCH HAS A STRONG MORAL AND THEOLOGICAL CODE IN WHICH PEYOTE PLAYS A CENTRAL ROLE

Largely to deflect attack from the more dominant, mainstream religions and antipeyotist elements in the state and federal governments, in 1918 Otoe peyote practitioners first formally organized by submitting articles of incorporation to the

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[23] Sections 4201-4230 of the Act are referred to as the "Indian Alcohol and Substance Abuse Prevention Treatment Act of 1986." *See* 100 Stat. 3207-137 through 3207-152, codified at 25 U.S.C. §§2401 *et seq.* Section 4203, 25 U.S.C. §2402, states as one of the purposes of the Act to "authorize and develop a comprehensive, coordinated attack upon the *illegal narcotics* traffic in Indian country. . . ." (Emphasis added.)

State of Oklahoma.[24] This first church was known as the First Born Church of Christ, a Biblical reference,[25] the membership of which was largely confined to the Otoe Tribe.[26]

That same year another group of Oklahoma peyotists met to establish the NAC. Article II of the Church's Articles of Incorporation state the purpose of the organization:

> The purpose for which this corporation is formed is to *foster and promote the religious belief of the several tribes of Indians in the State of Oklahoma, in the Christian religion with the practice of the Peyote*

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[24] An "organized" but unincorporated church known as the Peyote Society, or Union Church, was known to be in existence in 1914. Safford, William E., "An Aztec Narcotic," 6(7) *Journal of Heredity* 291, 306 (1915).

[25] "One Church of the Firstborn. . .and to Evangelize and spread Scriptural Holiness over all lands and to all people." Hebrews 12:23.

[26] Stewart, pp. 223-24.

> *Sacrament as commonly understood and used among the adherents of this religion* in the several tribes of Indians in the State of Oklahoma, and to teach the Christian religion with morality, sobriety, industry, kindly charity and right living and to cultivate a spirit of self-respect and brotherly union among the members of the Native Race of Indians, including therein the various Indian tribes in the State of Oklahoma.[27]

From the outset the NAC membership fervently worked to oppose antipeyote legislation on the federal and state levels. In 1925 the Church appointed a special delegate to Washington, D.C. to monitor the introduction or status of pending legislation on the subject.[28] The opposition to prohibitive legislation added a cohesive element to the Church, which was rapidly gaining popularity in Oklahoma and elsewhere. By 1925, the Church reported a membership of 1500 in Oklahoma alone.[29]

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[27] Stewart, p. 224 (emphasis added).

[28] Stewart, p. 226.

Today the religion continues to grow in popularity among Native Americans. Precise numbers are impossible to determine, inasmuch as no membership or participant lists are maintained by either state chapters or regional/national Church organizations such as the Native American Church of North America.[30]

A typical ceremony lasts the entire night and involves a number of different rituals. Peyote is essential for the conduct of the ceremony. *People v. Woody*, 394 P.2d 813, 817 (Cal. 1964); *State v. Whittingham*, 504 P.2d 950, 951 (Ariz. App. 1973). *See* Appendix A, attached hereto, for a description of a typical Native American Church ceremony.

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[29] Stewart, p. 226.

[30] Stewart, p. 327.

The theology of peyotism, like the ritual, is rooted in the past in a belief in the supernatural origin of the sacred cactus. To all NAC members, peyote is a divine plant given to Indians by divine revelation; it can and does work miracles. Peyote is believed to embody a spiritual deity; and the ingestion of the peyote assures participants in communicating directly with the Creator. *See* Affidavit of Stanley Smart, Smith Rec., Ex. 7. *See also* Appendix B which explains the theology of the Church.

The Peyote ethical code constitutes a way of life called "The Road." The code has four main parts:

a. Brotherly Love. Members should be honest, truthful, friendly, and helpful to one another.

b. Care of Family. Married people should not engage in extra-marital affairs, and should cherish and care for one another, and their children. Money should be spent on the family as a whole instead of selfishly.

c. Self-Reliance. Members should work steadily and reliably at their jobs and earn their own living.

d. *Avoidance of Alcohol. Peyote and alcohol are not to be mixed.*[31]

IV. THE FIRST AMENDMENT RIGHTS OF NATIVE AMERICAN CHURCH MEMBERS SUPERSEDE ANY LEGITIMATE STATE GOVERNMENTAL INTERESTS THAT MAY BE PRESENT IN THIS CASE

A. The First Amendment is designed to protect minority religions from deliberate or inadvertent interference by the majority.

An essential purpose of the Free Exercise clause is to protect minority religions with "different" beliefs and practices from interference by the majority through government action. *See Everson v. Board of Education*, 330 U.S. 1, 33-41 (1947). As recently explained in *Allegheny County v. Greater Pittsburgh ACLU*, 57 U.S.L.W. 5045 (1989),

> [p]erhaps in the early days of the Republic. . . [the words of the First Amendment] were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.

Id. at 5049, (quoting *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985)).

This Court has long recognized the role of the First Amendment in protecting minority religions against infringement by the majority. In *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), the Court found unconstitutional an ordinance which had the effect of prohibiting proselytizing by itinerant evangelists. In its decision the Court emphasized that

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[31] *Quoted from* The Native American Church of North America membership card (emphasis added).

> [t]he way of the religious dissenter has long been hard. But if the formula of this type of ordinance is approved, a new device for the suppression of religious minorities will have been found.

319 U.S. at 115. More recently, in *Wisconsin v. Yoder*, 406 U.S. 205, 238 (1972), Justice White, in explaining his vote in favor of the Amish, quoted language from Justice Brennan's concurrence and dissent in *Braunfeld v. Brown*, 366 U.S. 599 (1961), as follows: "religious freedom -- the freedom to believe and to practice strange and, it may be, foreign creeds has classically been one of the highest values of our society." Justice Jackson perhaps stated this "protective" concept best when, in holding that children of the Jehovah's Witnesses faith could not be required to salute the American flag in schools, he emphasized that

> [t]he very purpose of a Bill of Rights was to withdraw certain

> subjects from the vicissitudes of political controversy to place them beyond the reach of majorities. . ."

Board of Education v. Barrette, 319 U.S. 624, 638 (1943).

In short, while the political process normally protects mainstream religions, unpopular minority beliefs and practices may be threatened by majoritarian intolerance and must be protected by an unchanging guarantee of religious freedom -- the First Amendment. Moreover, cases such as *Yoder*, *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Bowen v. Roy*, 476 U.S. 693 (1986) illustrate that government impact upon minority religions can be inadvertent as well as purposeful and that it is necessary to protect against such inadvertent impact. See also *Thomas v. Review Board of Indiana Employment Security*, 450 U.S. 707, 717-718 (1981) (emphasizing that government action is not insulated merely because its impact is indirect). This application of the First Amendment recognizes that it is highly unlikely that the majority in control of the legislative branch of government will infringe upon its religious practices, even inadvertently. *See* Pepper, Stephen, "Taking the Free Exercise Clause Seriously", 1986 B.Y.U. Law Rev. 299. As an example, Professor Pepper notes the treatment of the large Catholic minority during Prohibition. As he explains, "[d]uring Prohibition it did not need the free exercise clause to protect importation and use of sacramental wine; such usage was excepted from Prohibition through the political process." *Id.* at 314.

These concepts compel a finding that the use of peyote by members of the NAC is exactly the type of religious practice

which it is essential for the First Amendment to protect. The NAC, like the Amish Church, is a church outside of the mainstream of American religions, but one with long-standing traditions. It is a true minority religion both in terms of its practices and membership. Like the Catholics' use of sacramental wine, the use of peyote is carefully controlled in a manner which enhances its spiritual impact and prevents abuse. Indeed, the federal exemption for religious peyote use parallels the exception for sacramental wine during prohibition. Compare 21 C.F.R. § 1307.31 with National Prohibition Act, 27 U.S.C. § 12 (1927), repealed by Liquor Law Repeal and Enforcement Act, Ch. 740, Title I, § 1, 49 Stat. 872 (1935). As we have discussed, the use of peyote is central to the faith of the NAC, see Appendix A, *infra*, more so than would appear to be the case for sacramental wine and Catholicism or, for that matter, non-attendance at school as it relates to the Amish faith.

B. Oregon has no compelling interest which would justify the prohibition of religious peyote use by Native American Church members.

Given the impact of its prohibition of all peyote use upon NAC members, the State must show that there is no less restrictive way to accomplish its legitimate governmental purpose without having an inadvertent impact upon this minority religion. *See Sherbert v. Verner, supra*. Many of the Court's Free Exercise cases have emphasized that the Government's interest must be looked at in terms of its application to those claiming the exception, not merely by evaluating the general state law enforcement interest asserted by Oregon in this case (even

assuming *arguendo* that this should be accepted in view of the finding of the court below regarding the state's *actual* interest -- the financial solvency of its unemployment compensation fund). This was most fully explicated in *Wisconsin v. Yoder, supra*, which Chief Justice Burger found that the state's general interest in education was inadequate to allow infringement of the Amish faith.

> Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exception.

406 U.S. at 221.

Justice White, in his concurring opinion in *Yoder*, likewise emphasized (quoting from *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) that "education is perhaps the most important function of state and local governments," 406 U.S. at 238, yet found that the state's interest in the context of the Amish exception was insufficient to override the Free Exercise clause. See also *Thomas v. Review Board of Indiana Employment Security*, 450 U.S. at 718-719 (government's interest must be viewed narrowly). The fact that a criminal statute is arguably involved in this case should not change the inquiry. The *Yoder* case itself involved the threat of criminal sanctions. 405 U.S. at 208.

In addition, the State must make an actual showing of its compelling interest, not merely speculate about the impact of an exception. In *Yoder*, 406 U.S. at 224, the state argued that compulsory public school attendance of Amish children through the

age of 16 would prepare individuals to become self-reliant should they choose to leave the Amish community. Rejecting that argument, the Court said that against the background of a religion that is hundreds of years old, it "would require a more particularized showing from the State on this point to justify the severe interference with religious freedom" that would result from an absolute compulsory education requirement. *Id.* at 227.

Here, the State claims that its ability to enforce its general criminal drug laws would be crippled by any exemption for the religious use of controlled drugs. Pet. Br. 11. Oregon "fears that religious drug use exemptions threaten to make state and federal laws a patchwork quilt of only partially enforceable prohibitions." *Id.* With this increase in protected drug use, Oregon asserts, is the natural decrease of uniform enforcement of criminal drug laws. *Id.* In addition, Oregon charges that "protected religious drug use would cause dramatic swelling of the ranks of such religious organizations [claiming exemption] and increase the use of illegal drugs." *Id.* Finally, the State would have the Court believe that peyote cannot be used safely by anyone for any purpose. *Id.* The State reaches this conclusion because peyote is a Schedule I drug, the most stringent regulatory schedule of drug enforcement, and therefore it is by definition inherently unsafe with a high potential for abuse.[32] Or. Rev. Stat. §475.992(4)(e)

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[32] The State's erroneous conclusion that any Schedule I drug cannot be used safely by anyone for any purpose is highlighted by medical uses of another Schedule I drug, marijuana. Doctors and researchers are allowed to prescribe marijuana for the side-effects of chemotherapy and for (Cont. on next page.)

(1985), 21 U.S.C. §812(b)(1) (1985). The only obvious solution, at least to Oregon, is a blanket prohibition on peyote use. Pet. Br. 11.

Oregon, in its zeal to protect against drug abuse, neglects several important factors in its premises, making the conclusions logically fallacious. First, most states and the federal government have expressly rejected the argument that generalized interests in fighting drug abuse require the complete prohibition of peyote use even in the context of legitimate religious ceremonies. Eleven states[33] and the federal government[34] have deliberately and expressly exempted peyote use for religious purposes by members of the NAC. In addition, another twelve states link their exemptions to those under federal law and, thus, also have an exemption for religious use of peyote by NAC members.[35] Clearly these twenty-three states and the federal government have no less of an interest in combatting drug

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[32] (Cont.) treatment of glaucoma. *Olsen v. DEA*, __ F.2d __, n. 4, 1989 WL 65278 (D.C. Cir. 1989).

[33] These states have high Native American populations. *See* Ariz. Rev. Stat. Ann. § 13-3402(B) (West Supp. 1987); Colo. Rev. Stat. § 12-22-317(3) (1985); Iowa Code Ann. § 204.204.8 (West 1987); Kan. Stat. Ann. § 65-4116(c) (8) (1985); Minn. Stat. Ann. § 152-02 Subd (Cont. on next page.)

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[33] (Cont.) 2(4) (West Supp. 1988); Nev. Rev. Stat. § 453.541 (1987); N.M. Stat. Ann. § 30-31-6(D) (Supp. 1988); S.D. Codified Laws Ann. § 34-20B-14(17) (1986); Tex. Stat. Ann. Art. 4476-15 § 4.11 (West 1976); Wisc. Stat. § 161.115 (1975); Wyo. Stat. § 35-7-1044 (1988).

[34] 21 C.F.R. § 1307.31 (1988).

[35] See Alaska Stat. § 11.71.195 (1983); Miss. Code Ann. § 41-29-111(d) (1981); Mont. Code Ann. § 50-32-203 (1987); N.J. Stat. Ann. § 24:21-3(c) (West Supp. 1988); N.C. Gen. Stat. § 90-88(d) (1985); N.D. Cent. Code § 19-03.1-02.4 (1981); R.I. Gen. Laws § 21-28-2.01(c) (1982); Tenn. Code Ann. § 39-6-403(d) (1982); Utah Code Ann. § 58-37-3(d) (1986); Va. Code Ann. § 54-524.84:1(d) (1982); Wash. Rev. Code § 69-50.201(d); W. Va. Code § 60A-2-202(d) (1984).

abuse than does Oregon, but unlike Oregon they see no conflict between legitimate law enforcement concerns and a peyote exemption. *See also People v. Woody*, 394 P.2d 813 (Cal. 1964) wherein the California Supreme Court responded to a similar "law enforcement" argument by stating:

> We know that some will urge that it is more important to subserve the rigorous enforcement of the narcotic laws than to carve out of them an exception for a few believers in a strange faith. They will say that the exception may produce problems in enforcement and that the dictate of the state must overcome the beliefs of a minority of Indians. But the problems of enforcement here do not inherently differ from those of other situations which call for the detection of fraud.

Id. at 821, accord *State v. Whittingham*, 504 P.2d 950 (Ariz. App. 1973).

In fact, in the recent case of *Olsen v. DEA, supra*, (rejecting an application for exemption of marijuana use by the

Ethiopian Zion Coptic Church), the Drug Enforcement Administration (DEA), the federal agency charged with enforcing the nation's policy against illicit drugs, confirmed its finding that the peyote exemption does not threaten law enforcement goals. The DEA reported that from 1980 to 1987, it seized and analyzed a total of only 19.4 pounds of peyote, while the amount of marijuana seized and analyzed for the same period was 15,302,468.7 pounds. __ F.2d at __. It concluded that this "overwhelming difference explains why an accommodation can be made for a religious organization which uses peyote in circumscribed ceremonies, and not for a religious organization which espouses continual use of marijuana." *Id.*[36]

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[36] In *Olsen*, the court correctly dismissed the notion that the recognition of the Native American church exemption and denial of the Ethiopian Zion Coptic Church exemption violates (Cont. on next page.)

Oregon has presented no reason why its idiosyncratic, undocumented beliefs about its general drug law enforcement interests in this case should be accepted. There is no showing that law enforcement interests are any different in the context of Oregon than are similar interests in the rest of the country. The State's assertions about its law enforcement interest are merely conclusory statements with no "particularized showing" as to how an exemption would prevent adequate enforcement of the drug laws. These assertions are flatly contradicted by statutory, regulatory and case law across the country.

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[36] (Cont.) either the Establishment Clause or the Equal Protection clause. __ F.2d at __. In the context of religion, neutrality means that the balancing test must be applied "evenhandedly" to every religion, not that the result of the balancing test must be the same in each instance. As *Olsen* illustrates, some religious practices come inextricably in conflict with compelling state interests and may not be protected -- others can coexist with the compelling interests of the state and must therefore be protected against governmental interference.

The state's second assertion that an exemption will lead to an influx of "new" Church members and increase the use of illicit drugs conveniently overlooks the closely supervised and regulated use of peyote provided by Church leaders during peyote ceremonies. See Appendix A (description of peyote ceremony). The Church's use of peyote is isolated to specific ceremonial occasions and is an object of worship. *See* Appendix B (description of the theology of the Native American Church); *Olsen v. DEA*, __ F.2d at __. In fact, as noted in *Olsen*, "use of peyote outside the ritual is sacrilegious. . . Thus the church, for all purposes other than the special, stylized ceremony, reinforced the state's prohibition." *Id.*;

accord People v. Woody, 394 P.2d at 817. The scope of the peyote exemption is further limited by the DEA requirement that the Church must register with DEA to receive a permit to purchase the sacrament. 21 U.S.C. §§ 821, 822. Thus, opportunities for abuse of the exemption are limited. Moreover, the granted exemption to the NAC does not require that all other churches be granted exemptions. See *Olsen v. DEA*, *supra* (rejecting Olsen's establishment clause-equal protection claim since the Zion Coptic Church is not similarly situtated as NAC, ___ F.2d at ___); *see also* footnote 37.

Third, the State's argument that all peyote use is unsafe and equates peyote use with practices such as self-mutilation, handling poison snakes and drinking poison ignores the fact that there is substantial evidence that the use of peyote in the manner circumscribed by the NAC manner is beneficial, not harmful. Religious peyote use has been successful in the treatment of alcoholism. *See, e.g.*, Pascarosa, Paul, M.D., and Sanfrod Futterman, "Ethnopsychedelic Therapy for Alcoholics: Observations in the Peyote Ritual of the Native American Church," 8(3) *Journal of Psychedelic Drugs* 215 (1976). Moreover, the evidence in the record in this case, uncontroverted by the State, demonstrates the positive therapeutic and rehabilitative effects of peyote use in the controlled meeting of a NAC ceremony. *See*, *Smith I* Rec., Exh. 7, Aff. of Terence Gorski, Robert Bergman, Omer C. Stewart, Stanley Smart and Emerson Jackson. Indeed, the overwhelming body of physical and social scientific evidence confirms the positive therapeutic and rehabilitative effects of peyote in a NAC ceremonial setting,

especially for Native Americans.[37] Peyotism does not foster drug abuse!

In short, *amici* agrees with the State that drug abuse has reached epidemic proportions, even among American Indian populations. And the State has a legitimate interest in combatting chemical abuse. But the State has simply not shown that a blanket prohibition of all peyote use is necessary to achieve that goal. A blanket prohibition is not "essential to accomplish an overriding governmental interest," *U.S. v. Lee*, 455 U.S. 252, 257 (1982), nor does the conduct involved here pose a substantial threat to public safety, peace or order. *See, e.g., Sherbert v. Verner, supra*. In fact, in this context, the State of Oregon's legislative interests lie in facilitating not obstructing the use of peyote in NAC ceremonies. Moreover, clearly the State's general law enforcement interests can be protected even if an exception for non-drug peyote use for NAC members is recognized. Indeed, the fact that there is no evidence that Oregon enforces its peyote criminal statute in the context of religious peyote use is a clear

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[37] *See, e.g.*, Aberle, David, *The Peyote Use Among The Navajo*, (Chicago 1966) ("they do not make peyote consumption a simple hedonic gratification"); Albaugh, Bernard J., and Anderson, Phillip O., "Peyote In The Treatment Of Alcoholism Among American Indians," 131 *Am. J. Psychiatry* 1247, 1248 (1974) ("the cathartic expression of emotions and feelings is one of the major benefits of the peyote ceremony to the alcoholic"); Bergman, R.L., "Navajo Peyote Use: Its Apparent Safety," 128 *Am. J. Psychiatry* 695 (1971) ("in a population of over 200,000 people there were no reports of peyote abuse or dependency: it is *uncommon* for Indians to use peyote outside of ceremonial meetings"); Dorrance, D.L.; Janiger, O.; and Teplitz, R., "Effects Of Peyote On Human Chromosomes," 243 *J.A.M.A.* 299-302 (1975) (chromosomal study of Indians with a life-long history, and a 1600-year cultural tradition of peyote ingestion, failed to reveal any increase in abnormalities); Pascarosa, P. and Futterman, S., "Ethnopsychedelic Therapy For Alcoholics: Observations In The Peyote Ritual Of The Native American Church," *supra*.

indication that no immutable governmental interest is at stake here. The absence of any evidence pertaining to peyote substance abuse in the twenty-three states providing for an exemption is likewise evidence that no compelling interest in an absolute prohibition is present here. In these circumstances, where there has been no particularized showing, and governmental interests are not compromised by a religious-based exemption, precedent requires that the First Amendment rights of NAC members be upheld. Indeed, given the parallels between this case and *Yoder*, we believe that the Court would need to overrule the *Yoder* case in order to rule against respondents. If *Yoder* remains good law, the result in this case is clear. The State's arguments achieve *at best* the same speculative quality as the State of Wisconsin's compelling interest argument rejected by this Court in *Yoder*.

The cases of *Bowen v. Roy, supra*, and *Lyng v. Northwest Indian Cemetery Prot. Assn.*, 485 U.S. ___, 99 L.Ed.2d 534 (1988) do not require a different result. In *Bowen*, five Justices of the Court would have applied the *Sherbert-Thomas* line of analysis to that case and upheld the First Amendment claim had they reached the merits of the part of the case which involved Roy's personal conduct as opposed to the government's internal activity. See 476 U.S. at 716, (Blackmun, J., concurring in part); 733 (White, J., dissenting); 728-730 (O'Connor, concurring in part). As illustrated, a similar approach would mandate affirmance of the court below in this case. Moreover, even if the rationale of those Justices that would not have applied the *Sherbert-Thomas-Yoder* precedents to uphold Roy's personal conduct

claim in *Bowen* is accepted, the result in this case should not change. Those Justices viewed *Sherbert v. Verner, supra* as requiring that the presence of secular exemptions in a "neutral" law require that a refusal to grant similar "religiously-based" exemptions must be strictly scrutinized. 476 U.S. at 708-709. Oregon's unemployment law has a "good cause" exemption. Or. Rev. Stat. § 657.176 (2)(c)(d)(e). Failure to include a religious-based termination would directly contravene this alternative interpretation of *Sherbert*. Likewise, Oregon drug laws contain exceptions for controlled medical use of certain substances, such as cocaine and morphine, both Schedule I drugs. Or. Rev. Stat. §§ 475.005-475.285. In the face of considerable evidence that the controlled religious use of peyote has beneficial effects upon NAC members akin to the physical effects presumably engendered by the use of controlled substances under the medical exemption, refusal to grant a peyote exemption would constitute discrimination against religion as defined in Chief Justice Burger's plurality opinion in *Bowen v. Roy, supra*.

In the *Lyng* decision, the Court's ruling was predicated upon the holdings that (1) the Government could not be forced to conduct its internal affairs to "comport with the religious beliefs of particular citizens" and (2) the plaintiffs in *Lyng* were not the subject of government coercion. 485 U.S. at ___, 99 L.Ed.2d at 546. In this case, neither issue is at stake. Denial of unemployment benefits as well as criminal sanctions against the use of certain substances are manifestations of the government's external police and social welfare powers, not the internal management of government affairs. Secondly, denial of benefits, or, even worse, criminal sanctions against peyote use clearly would have the effect of coercing NAC members not to exercise their religion. See *Thomas, supra*. See also *Bowen v. Roy*, 476 U.S. at 705, fn. 15 (Burger, C. J. op.) citing passage in *Wisconsin v. Yoder*, 406 U.S. at 218 which noted that the impact of the criminal sanctions in the compulsory education law would coerce the Amish into behavior at odds with fundamental tenets of their political beliefs.

CONCLUSION

The Native American Church is a minority church whose central ceremony includes the carefully circumscribed use of peyote in religious rituals of ancient origin. Oregon has not shown any compelling interest in denying benefits to nor enforcing coercive drug laws against

Native American Church members who use peyote in church ceremonies. The decision of the Court below must be affirmed.

Respectfully submitted,

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APPENDIX A

Omer Stewart describes in general a typical Native American Church ceremony:

> Except for the changes described below, the ritual remains the same. It generally begins about nine o'clock on a Saturday night. Today the participants are both men and women, although men are usually the leaders. They come dressed in their best clothes, having clean shirts and dresses. Many men were a silk handkerchief around the neck folded in a particular way and held together with a silver bola in the form of some peyote symbol - a button, a peyote bird, a cross. Some may wear red bead necklaces or other Indian jewelry, and some will have decorated cases which hold ceremonial feather fans handsomely beaded and tasseled with buckskin, to be used for incensing themselves with cedar smoke, and small gourd rattles similarly decorated. Some will wear blankets and shawls, for things Indian are the preferred dress. Some, especially women, will wear moccasins.
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> Even if the ceremony is held in a house, the peyotists sit on the

floor in a circle, the roadman[1] facing east, the chief drummer to his right and the cedarman to his left. The ceremony begins when the roadman takes from a special case his ceremonial paraphernalia consisting of a staff, usually carved or ornamented with beads and dyed horsehair (it will be placed in front of him in a Half Moon ceremony, stood upright in a Cross Fire ceremony); a decorated rattle; a special fan, probably of eagle feathers; and an eagle bone or reed whistle. He also produces a large peyote button thought to be the Chief Peyote, which he places on the moon altar. He also brings forth a sack of peyote buttons and usually a container of peyote tea to be consumed during the night, and, in the case of a Half Moon ceremony, two sacks of Bull Durham tobacco and papers of corn husks for the prayer cigarettes.

The Cedarman throws a quantity of cedar on the fire, producing a

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[1] The term "roadman" or "road chief" refers to the spiritual leader of a Church ceremony, an elder who usually has a long association and intimate familiarity with the ritualistic aspects of the peyote ceremony. *See, e.g.*, Pascarosa, Paul, M.D., and Sanfrod Futterman, "Ethnopsychedelic Therapy for Alcoholics: Observations in the Peyote Ritual of the Native American Church," 8(3) *Journal of Psychedelic Drugs* 215, 216 (1976).

dense aromatic smoke, and all the ritual objects, including the drum, are passed through this smoke in order to purify them. In the case of the Half Moon rite, the sacks of tobacco and papers are then circulated clockwise, and when all have prepared a cigarette, the roadman prays aloud and smokes his cigarette in concert with the others, who pray silently, all directing their smoke toward the fire and altar where rests the Chief Peyote. The sacks of peyote and tea are then passed clockwise around the circle, and each partakes either of tea or four buttons. The prayer and cigarettes finished and the first four peyote buttons eaten, the roadman, holding the staff and fan in one hand and vigorously shaking the rattle with the other, accompanied by the quick beat of the chief drummer, signs the ceremonial Opening Song, "Na he he he an yo witsi nai yo," syllables which go back to the Lipan Apache, to the songs of the first U.S. peyotists. He sings the hymn four times. He sings three more songs four times, and then the staff, fan, and rattle are passed clockwise to the next participant and the drum to that person's next neighbor. The person receiving the staff, fan and rattle then sings four songs four times, and passes it on the the next participant, and so the staff, rattle, fan, and drum go around the circle, each participant singing four songs four times. Before midnight, the singing continues in this way only interrupted a few times when the peyote is circulated again.

At midnight, the roadman signs another ceremonially determined song, the Midnight Water Call. Then the fireman brings a pail of water, which the cedarman passes through cedar smoke and blesses while smoking a prayer cigarette. After pouring a little on the ground "for Mother Earth," the water is passed around the circle to all participants. Today, instead of a common dipper as was used in the past, paper cups are often used. Sometimes during the Midnight Ceremony, the roadman usually goes outside and blows the whistle to the four directions; this, however, is one of the more variable elements of the ceremony and may be dispensed with or changed. At the end of the Midnight Ceremony, there is a recess lasting ten to thirty minutes when everyone goes outside to relieve himself or to stretch. It is a quiet time with little talking.

When the meeting resumes, the singing begins again and continued. One-half to tow-thirds of a peyote meeting is occupied in singing. Peyote may also be circulated. At this time the participants may take from

their cases their own ceremonial rattles and fans for use during singing. Also, individuals may request a prayer cigarette from the roadman, and the singing will stop while all listen to the prayer. These prayers are sometimes testimonials, sometimes supplications for help and guidance. This is also the time for a special curing ceremony, if such has been planned.

As the first rays of sunrise appear, the roadman sings another special song, the Dawn Song. He may also blow his whistle again to the four directions. This is followed by the entrance of the peyote woman, usually the wife of the host, who brings in water which is again blessed and circulated. She also brings the ceremonial breakfast of corn, meat, and fruit, which is circulated, with each person taking a bit of each food. Following the ceremonial breakfast, the roadman may give a little talk. If this has been a Cross Fire service, the roadman may read a text from the Bible and interpret its meaning to the congregation. In full daylight the roadman sings the last of the ceremonially determined songs, the Quitting Song. then he and the others carefully put away the ceremonial paraphernalia, wrapping the fans, rattles, and any other ceremonial objects in silk handkerchiefs and depositing them in their special boxes and cases. It is then that the meeting is over and all go outside to "welcome the sun."

Now the congregation begins to visit with one another, and the women begin preparation for breakfast. This will be the best meal that the host, assisted by his friends, can offer. There will be a good deal of talk concerning the feelings and experiences of the previous night. In the afternoon the peyotists will begin to leave for home, which for some could be a considerable distance. It is not unusual for peyotists to travel more than a hundred miles to attend a meeting.

Thus ends a typical ritual. Except for a few changes because of the circumstances of modern life and a few additions from Christian lore, the ceremony is the same as that observed by Mooney.[2] It should be borne in mind that the roadman is expected to use his judgment in the conduct of each ceremony, and he may make some variations, such as

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[2] Mooney, James, "The Kiowa Mescal Rite." Report of speech to the Anthropological Society of Washington. Washington, D.C. *Evening Star*, November 4, 1891, p. 6. Mooney was the ethnologist at the Smithsonian Institution's Bureau of American Ethnology, referred to *supra*.

dispensing with the eagle bone or reed whistle ceremony, or, for convenience, the fire and altar, if need be. But these are temporary, one-time variations, and all are aware of them. Anthropologists have recounted the ceremony many times, but peyotists themselves or the NAC have never fully written down the ceremony in order to study it or establish its exact form. The ritual is always learned by one man from another and repeated attendance at many meetings for the purpose of learning how it should be done.

It should be pointed out that among peyotists their religion is more than a ritual to attend from time to time, generally about once a month. It is a part of everyday life. Peyote singing is enjoyed at home. Most peyote homes will have a peyote rattle hanging on the wall. It is easy to take it down, fashion a drum from a piece of inner tube stretched over a coffee can, and do some singing. Children use rattles and drums in play and try to imitate the peyote singing of their elders. Adults more formally practice hymns at night.[3]

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[3] Stewart, pp. 328-30.

APPENDIX B

Liljeblad, Sven, *The Idaho Indians in Transition, 1805-1960* (1972) Special Publication, Pocatello: Idaho State University.

> The all-embracing view [of peyote] is that of a personal God in a monotheistic sense, and Peyote has come to the Indians to lead them to Him as Christ came to the whites. As God reveals Himself in Peyote, it becomes a sacrament whereby communion is established with Him or with the spiritual world in general. In prayers, sermons, and confessions at the meetings, there are frequent references to the Christian Trinity in terms of "Our Father" and "Our Brother Jesus" given in the vernacular, and "The Holy Ghost" given in English. As a meaningful and expressive pantheistic symbol, "Our Mother Earth" sometimes enters, all depending on the individual theory of life. Many a Peyote follower displays in private conversation a great deal of biblical knowledge. His tentative attempts at exegesis may sometimes seem strange, but no more so than the entangled conceptions in Christian scholasticism and sectarian amendments. He may take a quotation from the white man's

Scriptures at its face value, and it is often amazing what he can do with it in support of his own opinion. Most people to whom Peyote affords consolation, many of whom can neither read nor write, have no need of theological proofs in matters of faith. In conformity with traditional religious aspect, faith is sanctioned for each one according to his own means of direct revelations. Rather than being a weakness, this non-committal attitude in confession of faith is a great strength of the Peyote religion. It satisfies any demand for denominational and even secular individual freedom. The partaker may beside his adherence to the Peyote movement be a member of any other church, or of none, and yet feel in harmony with the group.

The religious conceptions in the sphere of belief which the Peyotist applies are imperative only to the extent that they guide him in his never-ceasing search for righteousness and in his prayers for health. His piety resolves itself in ethical norms based essentially on Christian moral values. But there is, also in his ethics, a considerable freedom of thought and conscience. In his observances, he has to take the road Peyote tells him to follow. Abstinence from alcohol occupies

a prominent place in his code of mores, evidently because alcohol consumption has caused so much trouble on the reservations. Chastity and family obligations are also of great concern, apparently for similar reasons. In general, one must try hard to do one's best as a self-supporting citizen and strive to become a respected member of the community. Friendliness and helpfulness between members of the group are much stressed. One must entertain friendly feelings toward one's neighbors and live in peace with all men. Coming as a novice to a meeting and asking the leader what to pray for, since you are neither sick nor troubled - which will surprise him greatly - would evoke the answer: "You should pray for peace, for those who are sick, and for your relatives." Consideration for other persons' problems justifies the Peyotist in disclosing his own grievances to other members of the group. Personal worries and shortcomings may be confessed. A statement during the testimonial period of a meeting may end with an appeal for moral support. Desire to help and to be helped in conforming to the moral standard of the group has a psycho-therapeutic function which certainly comes to actual want in the present time of frequent individual maladjustment among the reservation people.

Yet the curative power of Peyote is the vital point. Presumably most converts join for this reason. By following the Peyote Road, health and advanced age would be secured. In most cases, a meeting is sponsored by a person troubled about his health or a case of illness in his family. He appointed the leader and defrays the cost. The Indians themselves may refer to the Peyote cactus as a medicine. but to them "medicine" is not merely a pharmaceutical product of the kind bought in drugstores. In their language there are two ways of verbalizing the notion of medicine, and both may be applied to Peyote. One of these terms refers collectively to the great and varied number of botanical items which the Indians have used therapeutically for colds, rheumatism, sore eyes, toothaches, and for all kinds of ailments, and most of which are known and used in modern pharmacology. The other term refers to something much more subtle which even a very intelligent speaker of the language has a hard time defining. And no wonder, since it leads straight into mysticism. White writers have tried to catch the underlying idea with such contradictory term as "medicine," "supernatural power," and "the Great Spirit," none of which is sufficiently significant to cover the meaning. It may refer to an

immaterial force which manifests itself in Nature's realm. The healing Peyote is conceived by the great majority as a divine panacea and by the sophisticated few as spiritual power of healing through mental effort. While Peyote ethics are saturated with Christian ideology and represent the acceptance of new social values, the rituals which remains the core of the cult are entirely native. The number of ceremonial elements, except for the spoken word, to which a Christian meaning may be articulated is limited to one: the cross on the Peyote drum.